

No. 15-290

Title:	United States Army Corps of Engineers, Petitioner v. Hawkes Co., Inc., et al.
Docketed:	September 9, 2015
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(13-3067)
Decision Date:	April 10, 2015
Rehearing Denied:	July 7, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Sep 8 2015	Petition for a writ of certiorari filed. (Response due October 9, 2015)
Sep 14 2015	Waiver of right of respondents Hawkes Co., Inc., et al. to respond filed.
Sep 23 2015	DISTRIBUTED for Conference of October 9, 2015.
Sep 28 2015	Response Requested. (Due October 28, 2015)
Oct 6 2015	Motion for leave to file amicus brief filed by The National Association of Home Builders.
Oct 8 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Hawkes Co., Inc.
Oct 27 2015	Response to petition from respondents Hawkes Co., Inc., et al. filed.
Nov 10 2015	Reply of petitioner United States Army Corps of Engineers filed.
Nov 17 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 11 2015	Motion for leave to file amicus brief filed by The National Association of Home Builders GRANTED.
Dec 11 2015	Petition GRANTED.
Jan 19 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents.
Jan 22 2016	Joint appendix filed. (Statement of cost filed.)
Jan 22 2016	Brief of petitioner United States Army Corps of Engineers filed.
Jan 29 2016	SET FOR ARGUMENT ON Wednesday, March 30, 2016
Feb 3 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Feb 8 2016	Record requested from U.S.C.A. 8th Circuit.
Feb 8 2016	The time to file respondents' brief on the merits is extended to and including February 24, 2016.
Feb 10 2016	CIRCULATED.
Feb 17 2016	Record received from the U.S.C.A 8th Circuit. (1 Box)
Feb 24 2016	Brief of respondents Hawkes Co., Inc., et al. filed. (Distributed)
Mar 1 2016	Brief amicus curiae of Cause of Action Institute filed. (Distributed)

Mar 1 2016	Brief amici curiae of American Farm Bureau Federation, et al. filed. (Distributed)
Mar 1 2016	Brief amicus curiae of Center for Constitutional Jurisprudence filed. (Distributed)
Mar 1 2016	Brief amicus curiae of The Cato Institute filed. (Distributed)
Mar 2 2016	Brief amici curiae of Foundation for Environmental and Economic Progress, and Utility Water Act Group filed. (Distributed)
Mar 2 2016	Brief amici curiae of the Council of State Governments.et al. filed. (Distributed)
Mar 2 2016	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Mar 2 2016	Brief amicus curiae of Southeastern Legal Foundation filed. (Distributed)
Mar 2 2016	Brief amici curiae of Ernest M. Park and Lauren Kent Park filed. (Distributed)
Mar 2 2016	Brief amicus curiae of Mountain States Legal Foundation filed. (Distributed)
Mar 2 2016	Brief amici curiae of West Virginia, Ohio, and 21 Other States filed. (Distributed)
Mar 2 2016	Brief amicus curiae of The Chamber of Commerce of the United States of America filed.
Mar 2 2016	Brief amici curiae of California Farm Bureau Federation, et al. filed. (Distributed)
Mar 2 2016	Brief amici curiae of Ohio Chamber of Commerce, et al. filed. (Distributed)
Mar 2 2016	Brief amici curiae of States of North Dakota, et al. filed. (Distributed)
Mar 2 2016	Brief amici curiae of The National Association of Home Builders, et al. filed. (Distributed)
Mar 23 2016	Reply of petitioner United States Army Corps of Engineers filed. (Distributed)
Mar 30 2016	Argued. For petitioner: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: M. Reed Hopper, Sacramento, Cal.
May 31 2016	Adjudged to be AFFIRMED. Roberts, C.J., delivered the opinion of the Court, in which Kennedy, Thomas, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Kennedy, J., filed a concurring opinion, in which Thomas and Alita, JJ., joined. Kagan, J., filed a concurring opinion. Ginsburg, J., filed an opinion concurring in part and concurring in the judgment.
Jul 5 2016	JUDGMENT ISSUED
Aug 18 2016	Record from U.S.C.A. 8th Circuit has been returned.

15-290

No.

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. 1362(7); see 33 U.S.C. 1251 *et seq.*, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

PARTIES TO THE PROCEEDING

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Army Corps of Engineers (Corps), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a), is reported at 782 F.3d 994. The opinion of the district court (App., *infra*, 22a-43a), is reported at 963 F Supp. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2015. A petition for rehearing was denied on July 7, 2015 (App., *infra*, 103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the Appendix to this petition. App., *infra*, 105a-121a.

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); see Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*). Section 301(a) of the CWA prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to the "waters of the United States" from any "point source"—except "as in compliance with" specified provisions of the CWA. 33 U.S.C. 1311(a), 1362(7) and (12). The CWA allows discharges under two complementary permitting regimes. Section 404 authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d). Section 402 authorizes the Environmental Protection Agency (EPA) to issue permits for the discharge of any pollutant other than dredged or fill material. 33 U.S.C. 1342.

The Corps' regulations authorize (but do not require) the Corps to provide the agency's view on whether particular tracts contain "waters of the United States" that are subject to the agency's regulatory authority under Section 404 of the CWA when a landowner (for instance) asks the Corps to do so. See 33 C.F.R. 320.1(a)(6), 331.2; see also 33 C.F.R. Pt. 331, App. C. The Corps may provide its view in a document called a "[j]urisdictional determination," which applicable regulations define as "a written Corps

determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or * * * the River and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*)." 33 C.F.R. 331.2 (emphasis omitted). Neither the CWA nor its implementing regulations require a landowner to obtain a jurisdictional determination before discharging dredged or fill material.

An "[a]pproved jurisdictional determination" is "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel."[1] 33 C.F.R. 331.2 (emphasis omitted). An approved jurisdictional determination is valid for five years, 33 C.F.R. Pt. 331, App. C, "unless new information warrants revision of the determination before the expiration date." Corps, Regulatory Guidance Letter No. 05-02, ¶ 1 (June 14, 2005). When the Corps issues an approved jurisdictional determination, an affected party may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331.

Whether or not a jurisdictional determination has been requested or issued, a landowner planning to discharge dredged or fill material on its property has various options. The landowner may apply for a

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[1] The Corps' regulations also provide for issuance of preliminary jurisdictional determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. 331.2. Preliminary jurisdictional determinations thus do not reflect any conclusion about whether "waters of the United States" are present. *Ibid.*; see Corps, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008).

Section 404 permit from the Corps. See 33 U.S.C. 1344; 33 C.F.R. Pts. 323, 325; 40 C.F.R. Pt. 230. If the landowner, having exhausted administrative remedies, is dissatisfied with the Corps' final permitting decision, it may seek judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, including with respect to the Corps' determination that the property at issue contains waters protected by the CWA. See, *e.g.*, *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006). The landowner may also proceed under an applicable general permit previously issued by the Corps. See 33 U.S.C. 1344(e); 33 C.F.R. Pt. 330 (nationwide permit program).

Alternatively, a landowner may proceed without seeking a permit. The CWA exempts numerous activities, including certain farming and road-maintenance activities, from the permitting requirements. 33 U.S.C. 1344(f). If the activity is not subject to any exemptions, and the government determines that a completed or ongoing discharge violates the CWA, then the government may take administrative action, including the issuance of a warning letter, a "cease and desist" order, 33 C.F.R. 326.3(c), an administrative compliance order, an administrative penalty, or a combination of those options, see 33 U.S.C. 1319(a) and (g). The recipient of an EPA compliance order may bring suit under the APA to challenge the order, and it may contend that the property is not covered by the CWA. See *Sackett* v. *EPA*, 132 S. Ct. 1367, 1370-1371 (2012). The government may also bring an enforcement action in district court to obtain injunctive

and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may contend, *inter alia*, that its conduct did not violate the CWA because it did not involve a discharge into "the waters of the United States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-703 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). In any of those proceedings, the fact that the landowner previously received a jurisdictional determination does not expose it to additional penalties or otherwise alter its rights or obligations within the proceeding.

b. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. 704. "As a general matter, two conditions must be satisfied for an agency action to be 'final'" under the APA. *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (citation and internal quotations omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (citation and internal quotations omitted).

In *Sackett*, *supra*, this Court held that an EPA compliance order, which reflects the EPA's determination that a landowner has violated the CWA by discharging pollutants into protected waters without a permit and which requires remedial action, see 33 U.S.C. 1319(a)(3), is "final agency action" subject to judicial review under the APA, 5 U.S.C. 704; see 132 S. Ct. at 1371-1372. The Court explained that the

compliance order represented the "consummation" of the agency's decisionmaking process because the EPA's conclusion that the Sacketts had violated the CWA was not subject to further review within the agency. *Sackett*, 132 S. Ct. at 1372 (quoting *Bennett*, 520 U.S. at 178) (internal quotation marks omitted). The Court also concluded that the compliance order "determined rights or obligations." *Id.* at 1371 (quoting *Bennett*, 520 U.S. at 178). The Court explained that the order by its terms imposed "the legal obligation to 'restore'" the property in question, and that the order required the Sacketts to give the EPA access to their property. *Ibid.* In addition, the order imposed "legal consequences" by "expos[ing] the Sacketts to double penalties in a future enforcement proceeding" and "severely limit[ing] [their] ability to obtain a permit" under the CWA. *Id.* at 1371-1372.

2. a. Respondents Pierce Investment Company and LPF Properties, LLC, own 530 acres of land in Minnesota. Respondent Hawkes Co., Inc. (Hawkes), would like to mine the 530 acres for peat, which is formed in wetlands. Hawkes has an existing peat mining operation nearby and would pay royalties to respondent property owners. App., *infra*, 5a-6a, 23a.

In December 2010, Hawkes applied for a Section 404 permit from the Corps. In March 2011, the Corps informed Hawkes of the Corps' preliminary determination that the property contains waters of the United States. App., *infra*, 6a. In February 2012, after further meetings and visits to the property, the Corps provided Hawkes with an approved jurisdictional determination, which concluded that the property contains waters of the United States. *Id.* at 6a-7a. Respondents' complaint alleges that, during the pro-

cess of developing the jurisdictional determination, Corps employees asserted that the permit process would be costly and time-consuming. *Id.* at 6a; C.A. J.A. 9 (Am. Compl. ¶ 40).

Respondents filed an administrative appeal. In October 2012, finding that the approved jurisdictional determination lacked sufficient analysis to support a finding of regulatory jurisdiction, the Corps' Mississippi Valley Division remanded the jurisdictional determination for reconsideration. App., *infra*, 7a, 44a. In December 2012, the Corps issued a revised approved jurisdictional determination, which again concluded that the property contains waters of the United States. *Id.* at 7a-8a, 44a-102a. The revised approved jurisdictional determination explained that the property contains approximately 150 acres of wetlands that are adjacent to waters that flow directly or indirectly into traditional navigable waters. *Id.* at 50a-51a. The Corps concluded that the wetlands have a significant nexus with a traditional navigable water, the Red River of the North. *Id.* at 83a-100a.

b. In 2013, respondents filed this action, alleging that the Corps' jurisdictional determination was arbitrary and capricious under the APA, 5 U.S.C. 706(2). App., *infra*, 8a, 27a. The Corps moved to dismiss, arguing that the jurisdictional determination was not "final agency action" subject to judicial review under the APA, 5 U.S.C. 704, and that respondents' challenge to the jurisdictional determination was not ripe. App., *infra*, 8a.

The district court dismissed the suit. App., *infra*, 22a-43a. The court held that the Corps' jurisdictional determination was not final agency action under *Bennett*. *Id.* at 31a. The court concluded that, although

the jurisdictional determination "satisfies the first *Bennett* condition" because it marks the consummation of the agency's decisionmaking, *id.* at 32a, it "does not satisfy the second *Bennett* condition" because "it does not determine [respondents'] rights or obligations," *id.* at 34a. The court explained that the jurisdictional determination "does not order [respondents] to take any kind of action" or "affect the legal standards used by agencies and courts in determining where the CWA applies." *Id.* at 35a. The court held that *Sackett* did not require a different result because the EPA compliance order at issue there subjected the recipient to several immediate consequences, including the obligation to remediate the property, and also limited the recipient's ability to obtain a permit. *Id.* at 36a-43a.

3. a. The court of appeals reversed. App., *infra*, 1a-17a. The court held that a jurisdictional determination is a reviewable "final agency action" under the APA. *Id.* at 16a-17a. The court acknowledged that the Fifth Circuit had reached the opposite conclusion in *Belle Co.* v. *United States Army Corps of Engineers*, 761 F.3d 383 (2014), cert. denied *sub nom. Kent Recycling Services, LLC* v. *United States Army Corps of Engineers*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015). The court concluded, however, that the Fifth Circuit had "misapplied the Supreme Court's decision in *Sackett*." App., *infra*, 2a. In the court of appeals' view, "the Court's application of its flexible final agency action standard in *Sackett*" indicated that a jurisdictional determination should be considered final agency action. *Id.* at 5a.

The court of appeals held that the jurisdictional determination satisfied *Bennett*'s first prong because it "was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority." App., *infra*, 9a. The court explained that the Corps' regulatory guidance describes an approved jurisdictional determination as a "definitive, official determination." *Ibid.* (citation omitted).

Turning to *Bennett*'s second prong, the court of appeals concluded that an approved jurisdictional determination determines "rights and obligations" and imposes "legal consequences." App., *infra*, 10a. The court found little difference between "an agency order that compels affirmative action," such as the EPA compliance order at issue in *Sackett*, and a jurisdictional determination, which, in the court's view, "prohibits a party from taking otherwise lawful action." *Id.* at 11a. The court stated that a jurisdictional determination "requires [respondents] either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." *Ibid.*

The court of appeals also held that "there is no other adequate [judicial] remedy" if immediate judicial review of the Corps' jurisdictional determination is unavailable. App., *infra*, 13a (citation omitted; brackets in original); see 5 U.S.C. 704. While acknowledging that respondents could seek a permit and then obtain judicial review of that decision, the court asserted that, "as a practical matter, the permitting option is prohibitively expensive and futile." App., *infra*, 14a. The court also stated that respondents' "other option—commencing to mine peat without a permit and await an enforcement action—is even more

plainly an inadequate remedy" because respondents could incur "huge additional potential liability" by doing so. *Ibid.* (citing *Sackett*, 132 S. Ct. at 1372). The court therefore concluded that "a properly pragmatic analysis of * * * final agency action principles compels the conclusion that an [a]pproved [jurisdictional determination] is subject to immediate judicial review." *Id.* at 16a.

b. Judge Kelly concurred. App., *infra*, 18a-21a. She described the reviewability issue presented here "as a close question." *Id.* at 18a. She observed that a jurisdictional determination does not alter the recipient's legal obligations in the way that the compliance order in *Sackett* did. *Id.* at 18a-20a. Judge Kelly concluded, however, that a jurisdictional determination should be immediately reviewable to provide the landowner an opportunity, before seeking a permit, "to show the CWA does not apply to its land at all." *Id.* at 20a.

4. The court of appeals denied the Corps' petition for rehearing en banc and for panel rehearing. App., *infra*, 103a-104a.

5. In 2015, after a multi-year process and after the court of appeals issued its decision in this case, the Corps and the EPA issued a new rule clarifying the agencies' interpretation of the scope of waters covered by the CWA. See 80 Fed. Reg. 37,055 (June 29, 2015) ("In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the [CWA], based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute."); see also 79 Fed. Reg. 22,188 (Apr. 21, 2014).

That rule provides that it will govern jurisdictional determinations issued after its effective date. 80 Fed. Reg. at 37,054, 37,073-37,074. The approved jurisdictional determination at issue in this case was issued under the agencies' previous interpretation of CWA coverage, and the new rule does not affect its five-year period of validity.[2] See p. 3, *supra*; 80 Fed. Reg. at 37,074.

REASONS FOR GRANTING THE PETITION

This case presents a significant question concerning the proper mode and timing of judicial review of a jurisdictional determination stating that particular property contains "waters of the United States" covered by the CWA. 33 U.S.C. 1362(7). The court of appeals held that a jurisdictional determination is reviewable "final agency action" under the APA. 5 U.S.C. 704. That ruling conflicts with the Fifth Circuit's recent decision in *Belle Co.* v. *United States Army Corps of Engineers*, 761 F.3d 383 (2014), cert. denied *sub nom. Kent Recycling Services, LLC* v. *United States Army Corps of Engineers*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015).

A square but shallow circuit conflict thus has developed on the question whether, in light of this Court's decision in *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), a Corps jurisdictional determination is judicially reviewable final agency action. In addition to this

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[2] Recipients of approved jurisdictional determinations predating the new rule have the option, however, of requesting that the Corps issue a new jurisdictional determination under the new rule. 80 Fed. Reg. at 37,074. In that event, the Corps would reconsider the CWA-coverage issue in light of current conditions on the property and the standards announced in the new rule.

petition seeking review of the Eighth Circuit's decision, a petition for rehearing of this Court's denial of certiorari in *Kent Recycling Services, LLC* v. *United States Army Corps of Engineers* (No. 14-493) is currently pending before the Court.[3] In that case, however, there are significant questions concerning whether petitioner Kent Recycling has standing and whether the case remains live. See 14-493 Br. in Opp. 8-12; 14-493 Br. in Opp. to Pet. for Reh'g 5-8. If the Court concludes that the question presented here should be resolved now rather than left for further percolation in the courts of appeals, this case would provide a more suitable vehicle than *Kent Recycling* for resolution of that issue.

A. The Decision Below Created A Circuit Conflict

1. As the court of appeals acknowledged, App., *infra*, 2a, its decision squarely conflicts with the Fifth Circuit's decision in *Belle*, *supra*. There, the Fifth Circuit held that a jurisdictional determination does not satisfy the test for final agency action set forth in *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), because it does not impose legal obligations or consequences beyond those already imposed by the CWA itself. *Belle*, 761 F.3d at 389-394. The decision below also conflicts with the Ninth Circuit's pre-*Sackett* decision in *Fairbanks North Star Borough* v. *U.S. Army Corps of Engineers*, 543 F.3d 586 (2008), cert. denied, 557 U.S. 919 (2009) (*Fairbanks*).

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[3] Because the petition for a writ of certiorari seeking review of the Fifth Circuit's decision in *Belle*, *supra*, is captioned *Kent Recycling Services, LLC* v. *United States Army Corps of Engineers* (No. 14-493) in this Court, this brief refers to the petition in No. 14-493 as *Kent Recycling*.

Unlike the Eighth Circuit, the Fifth Circuit in *Belle* concluded that this Court's decision in *Sackett* does not mandate the conclusion that a jurisdictional determination is final agency action. *Belle*, 761 F.3d at 391-392. The Fifth Circuit explained that the EPA compliance order at issue in *Sackett* imposed legal obligations and consequences that went beyond those imposed by the CWA. *Id.* at 391 (citing *Sackett*, 132 S. Ct. at 1371-1372). Unlike a compliance order, the Fifth Circuit explained, a jurisdictional determination is simply a "notification of the property's classification as wetlands" that "does not state that [the recipient] is in violation of the CWA," does not increase the recipient's exposure to penalties, and does not affect its ability to obtain a permit. *Id.* at 391-393.

2. The division between the Fifth and Eighth Circuits is unlikely to be resolved without this Court's intervention. The Eighth Circuit was aware of the Fifth Circuit's contrary ruling in *Belle* when it issued the decision below. App., *infra*, 2a. The government sought rehearing en banc on the ground that the decision created a conflict with *Belle*, but the Eighth Circuit denied the petition. *Id.* at 103a-104a. The circuit conflict is therefore likely to endure until this Court resolves the issue.

B. The Decision Below Is Incorrect

To be final agency action under 5 U.S.C. 704, an agency determination "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation and internal quotation marks omitted). The court of appeals concluded that the jurisdictional determination at issue in this case satisfies that standard because it "requires [respondents] either to

incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." App., *infra*, 11a. That is incorrect. The jurisdictional determination does not create the quandary that concerned the court, since a landowner who has not received a jurisdictional determination faces precisely the same set of options, and precisely the same exposure to penalties for any CWA violations that his conduct may entail. Receipt of a jurisdictional determination simply provides the landowner with additional information that may assist him in choosing among the available options.

1. a. A jurisdictional determination informs the landowner of the Corps' view that particular property contains "waters of the United States" and is therefore subject to the CWA's prohibition on unauthorized pollutant discharges into those waters. 33 U.S.C. 1362(7); see 33 U.S.C. 1311(a). The jurisdictional determination does not direct the landowner to take (or refrain from taking) any action, and it does not impose any obligations not already imposed by the CWA. If the property in fact contains waters of the United States, the CWA requires the landowner to obtain a permit before discharging pollutants into those waters, whether or not he has requested or received a jurisdictional determination. 33 U.S.C. 1311(a), 1342, 1344; 33 C.F.R. 331.2.

The jurisdictional determination also does not alter the manner in which the Corps may enforce the CWA. Whether or not the Corps has issued a jurisdictional determination, if the Corps or the EPA concludes that a landowner has violated the CWA by discharging pollutants without a permit, the EPA may issue an

administrative compliance order (of the sort at issue in *Sackett*), or it may institute an administrative penalty proceeding and impose a penalty. 33 U.S.C. 1319(a) and (g). Both types of administrative action afford the landowner the opportunity to obtain immediate judicial review of the agency's underlying conclusion that the land contains waters of the United States. See 33 U.S.C. 1319(g)(8) (providing for judicial review of administrative penalty decision); *Sackett*, 132 S. Ct. at 1371-1372 (compliance orders are reviewable under the APA).

Such enforcement actions are necessarily predicated on the agency's assessment that the CWA applies to the waters in question; but the fact that the Corps has previously expressed that assessment in a jurisdictional determination does not affect the landowner's rights in an administrative penalty proceeding. See 33 U.S.C. 1319(a) and (g); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 129-130 (1939). Similarly if the United States commences a judicial enforcement action, the Corps' prior issuance of a jurisdictional determination would not alter the United States' burden of establishing that the land in fact contains waters of the United States. 33 U.S.C. 1319(b). And if the landowner is ultimately found liable in any of those proceedings, the jurisdictional determination does not alter the range of potential sanctions to which the landowner is subject under the CWA. 33 U.S.C. 1319(d). Thus, before and after a jurisdictional determination is issued, the landowner faces the same legal regime, the same potential obligations, and the same legal exposure.[4]

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[4] The court of appeals believed that a jurisdictional determination increases "the penalties [respondents] would risk if they chose

b. In concluding that a jurisdictional determination satisfies *Bennett*'s second prong, the court of appeals conflated the potential *practical* effects of a jurisdictional determination with the altered *legal* obligations that are required under *Bennett*. App., *infra*, 11a-13a. It is true that, as a practical matter, a landowner who receives a jurisdictional determination that his property contains CWA-protected waters may have a greater incentive to seek a permit than someone who has not received a similar determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys to the landowner about the agency's view of the CWA's coverage. When an agency communication does not alter the legal obligations or sanctions to which the recipient is already subject, that sort of practical effect is not sufficient to render the communication "final agency action." See *National Ass'n of Home Builders*

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to begin mining without a permit" because violating the CWA after receiving a jurisdictional determination would result in "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." App., *infra*, 15a. That is incorrect. The CWA directs a court, in assessing an appropriate civil penalty for a violation, to consider, *inter alia*, any "good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). In addition, the CWA imposes criminal penalties for violating certain enumerated provisions of the statute, and knowing violations are subject to greater potential penalties. 33 U.S.C. 1319(c)(1)-(2). But those provisions do not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination. At most, a property owner's receipt of a jurisdictional determination might be offered as evidence of the owner's knowledge of its obligations under the CWA. See *Fairbanks*, 543 F.3d at 595. But the same could be said of any number of non-final agency warnings or opinion letters, or even a private consultant's report.

v. *Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning underlying statutory obligation is insufficient to establish legal consequences under *Bennett*).

The court of appeals therefore erred in likening a jurisdictional determination to a regulation or order that "prohibits a party from taking otherwise lawful action." App., *infra*, 11a. The decisions on which the court relied (*id.* at 11a-13a) all concerned regulatory actions that imposed additional legal requirements, beyond those established by statute, with which regulated parties were required to comply. See *Bennett*, 520 U.S. at 178 (where agency opinion authorized entities to "take" endangered species only upon fulfillment of conditions listed in the opinion, and entities could be penalized for violating those conditions, opinion "alter[ed] the legal regime"); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151-152 (1967) (regulations were final because they "ha[d] the status of law and violations of them carry heavy criminal and civil sanctions"); *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 418 (1942) (regulations had the "force of law" because they "require [the Federal Communications Commission] to reject and authorize it to cancel licenses on the grounds specified in the regulations without more"); see also *Frozen Food Express* v. *United States*, 351 U.S. 40, 41-45 (1956) (order determining which commodities fell within a statutory "agricultural" exemption to a permitting requirement was final because it established a rule of general applicability that had the force of law).

c. The court of appeals' reliance on *Sackett* was misplaced. In holding that the EPA compliance order at issue in *Sackett* was final agency action, the Court

did not rely on the pragmatic incentives that recipients likely felt upon being notified of the agency's allegations that their property contained covered waters and that they had violated the CWA. Rather, the Court found dispositive the fact that the compliance order materially increased both the landowners' legal obligations and the penalties to which they were potentially subject. 132 S. Ct. at 1371-1372. A jurisdictional determination does not similarly alter the legal status quo.

Specifically, the *Sackett* Court explained that the compliance order imposed a "legal obligation" on the Sacketts to "'restore' their property according to an agency-approved Restoration Work Plan," and to give the EPA access to the property and relevant documentation. 132 S. Ct. at 1371. Those obligations arose "[b]y reason of the [compliance] order," not as a result of the CWA itself. *Ibid.* The *Sackett* Court further concluded that "'legal consequences flow' from issuance of the [compliance] order" because, under the CWA, a landowner can be liable for penalties for violating the compliance order itself, in addition to penalties for violating the Act. *Ibid.* (quoting *Bennett*, 520 U.S. at 178) (citation and internal quotation marks omitted). The compliance order also "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" under Corps regulations that restrict the availability of permits for activities that are the subject of a compliance order. *Id.* at 1372.

A jurisdictional determination possesses none of the characteristics that were dispositive in *Sackett*. It does not require the recipient to take any action, remedial or otherwise. Nor does it expose a recipient to any additional penalties beyond those that the CWA

provides for violating the statute. 33 U.S.C. 1319(d). A jurisdictional determination also has no impact on the recipient's ability to obtain a permit, since the regulations limiting permits following a compliance order do not apply to jurisdictional determinations. See 33 C.F.R. 326.3(e)(1)(iv). And because jurisdictional determinations (unlike EPA compliance orders) are typically provided to persons who request them, they are not easily used "to enable the strong-arming of regulated parties." *Sackett*, 132 S. Ct. at 1374.

2. Even if a jurisdictional determination satisfied *Bennett*'s requirements for final agency action, review would be available under the APA only if there is "no other adequate [judicial] remedy." 5 U.S.C. 704. Contrary to the court of appeals' conclusion (App., *infra*, 13a-16a), respondents possess adequate alternative opportunities to argue in court that their property does not contain CWA-protected waters.

The permitting process provides one such avenue.[5] When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, and may contend in that proceeding that any waters on its property are not covered by the Act. See 33 U.S.C. 1344(a); 33 C.F.R. 331.10, 331.12; see also *Pre-*

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[5] In *Sackett*, the Court concluded that the Corps' permitting process did not provide an adequate means of seeking review of an EPA compliance order. That holding, however, was based on a circumstance not present here. Because the *EPA* had issued the compliance order, the Court stated that judicial review of the Corps' permitting decision would not "provide an 'adequate remedy' for action already taken by another agency." 132 S. Ct. at 1372. Here, the Corps "issued the [jurisdictional determination], so it is not the case that the only alternative remedy is one provided by a different agency." *Belle*, 761 F.3d at 394 n.4.

con Dev. Corp. v. *United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011). Many parties have obtained judicial review of a CWA-coverage issue through that route. See, *e.g.*, *Carabell* v. *United States*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006). And if the Corps grants a permit that the applicant accepts, there will be no need for judicial review of the threshold jurisdictional determination.

A recipient of a jurisdictional determination who elects to proceed with discharges on his property may also seek judicial review of the CWA coverage issue if he is the subject of an agency-initiated enforcement proceeding. If the agency imposes administrative penalties, 33 U.S.C. 1319(g), or issues an EPA compliance order, 33 U.S.C. 1319(a), those actions are immediately reviewable. See pp. 4-5, *supra*. The United States could also initiate a judicial enforcement action, in which it would have to demonstrate by a preponderance of the evidence that the property contains covered waters. 33 U.S.C. 1319(b).

To be sure, the permitting process can sometimes be expensive, and a landowner who discharges dredged or fill material without a permit may face monetary penalties if a court ultimately concludes that the discharges occurred into CWA-protected waters. It is therefore understandable that persons in respondents' position would prefer a pre-permit, pre-discharge judicial ruling on the CWA coverage issue. Neither the CWA nor the applicable agency regulations, however, *require* the Corps to issue jurisdictional determinations, either in general or in any particular case. If respondents had not received a juris-

dictional determination, they could have obtained a judicial ruling on the coverage question only through the routes described above, *i.e.*, by applying for a permit and then seeking judicial review of the Corps' decision on that application, or by contesting the CWA's applicability in opposing any enforcement action. The fact that respondents requested and received a jurisdictional determination does not make those avenues of review any less "adequate" than they would otherwise be.

C. The Question Presented Is Recurring And Significant

1. The Corps issues tens of thousands of approved jurisdictional determinations every year. See 80 Fed. Reg. at 37,065; Corps, *Regulatory—Protecting the Integrity of America's Waters* (Feb. 2, 2015), http://www.usace.army.mil/Portals/2/docs/civilworks/budget/strongpt/fy16sp_regulatory.pdf. Although the CWA does not require the Corps to issue jurisdictional determinations, see 33 C.F.R. 320.1(a)(6), the Corps provides them in order to give requesting landowners information about the agency's view of CWA coverage. And while no statutory or regulatory provision requires property owners to seek jurisdictional determinations before undertaking plans for their property or applying for a permit, those who request them are able to take the agency's views on CWA coverage into account in deciding how best to proceed.

Under the court of appeals' decision, a landowner who disagrees with the agency's approved jurisdictional determination may obtain judicial review immediately, before the Corps has had an opportunity to consider whether the landowner's contemplated activities would require a CWA permit, whether those activities are already covered by a general permit, see

33 U.S.C. 1344(e)(1), or whether an application for an individual permit should be granted. And if the Corps prevails in such a suit, the court's decision will not definitively resolve the CWA coverage question. If jurisdictional determinations are reviewable under the APA, they would presumably be reviewed under the APA's deferential "arbitrary [and] capricious" standard. 5 U.S.C. 706(2)(A). A judicial decision upholding a jurisdictional determination under that standard would not prevent the landowner from arguing, in a subsequent civil enforcement action, that the agency had failed to prove by a preponderance of the evidence that the property in question contained waters of the United States.

Allowing immediate judicial review of the Corps' jurisdictional determinations would therefore create a system of piecemeal and potentially duplicative proceedings. That prospect might deter the Corps from engaging in an informational practice that is triggered by a landowner's request and is intended to benefit landowners as well as to promote compliance with the CWA. See *Belle*, 761 F.3d at 394 (immediate judicial review would "disincentivize the Corps from providing [jurisdictional determinations]," thereby "undermin[ing] the system through which property owners can ascertain their rights and evaluate their options").

2. The question presented is likely to recur. The Corps issues thousands of jurisdictional determinations each year, and the Eighth Circuit's decision in this case will likely encourage other regulated parties to seek immediate judicial review. Indeed, at least one other suit seeking review of a jurisdictional determination is currently pending before a district court in the Seventh Circuit. See *Orchard Hill Bldg.*

Co. v. *United States Army Corps of Eng'rs*, 1:15-cv-6344 Docket entry No. 1 (N.D. Ill. July 21, 2015).

D. This Case Is A Better Vehicle Than *Kent Recycling* For Addressing The Question Presented

The petition for a writ of certiorari in *Kent Recycling* likewise presents the question whether a Corps jurisdictional determination is judicially reviewable under the APA. 14-493 Pet. i. The Court denied certiorari in *Kent Recycling* in March 2015, shortly before the Eighth Circuit issued its decision in this case. Kent Recycling then sought rehearing on the basis of the circuit conflict created by the Eighth Circuit's decision, see 14-493 Pet. for Reh'g 3-6, and the petition for rehearing remains pending before this Court. If the Court concludes that the question presented warrants its review, this case is the better of the two vehicles for resolving the issue.

1. As the government explained in its brief in opposition to the certiorari petition in *Kent Recycling*, it is unclear whether Kent Recycling has standing to seek this Court's review and whether the case continues to present a live controversy. See 14-493 Br. in Opp. 8-12. Although Kent Recycling alleges that it holds an option to purchase the property in question, 14-493 Pet. App. A2; see *id.* at D4 (3:12-cv-247 Compl. ¶ 14), the owner of the property at issue did not file its own certiorari petition challenging the Fifth Circuit's decision, and is actively pursuing a permit to use the property as part of a mitigation bank (*i.e.*, as wetlands that will be protected in order to offset authorized impacts on other waters protected by the CWA), see 14-493 Br. in Opp. 11-12. In addition, the jurisdictional determination at issue in *Kent Recycling* expired by its terms on May 15, 2014. 14-493 Pet. App. E2; 14-

493 Br. in Opp. 12 n.3. Although the Corps might (or might not) reach the same coverage determination under the new "waters of the United States" rule, the expiration of the purported "final agency action" that Kent Recycling seeks to challenge creates a further potential threshold obstacle to this Court's resolution of the question presented in that case.

2. This case, by contrast, presents no significant defects as a vehicle for addressing the question whether a jurisdictional determination is final agency action. Respondents in this case include the owners of the relevant land, and there is no reason to doubt their continuing interest in mining peat on the property. And while the jurisdictional determination respondents seek to challenge was issued under the agency's previous interpretation of CWA coverage, which has been superseded by the new rule, the jurisdictional determination itself is valid until 2017. Unless respondents request a new jurisdictional determination under the new rule, they will retain a continuing interest in whether the existing jurisdictional determination is immediately reviewable.

Thus, if the Court concludes that the question presented warrants its review at this time, the Court should grant this petition for a writ of certiorari. The petition for rehearing in *Kent Recycling* (No. 14-493) could then be held pending the resolution of this case, and disposed of as appropriate in light of the Court's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2015

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 13-3067

HAWKES CO., INC., ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT-APPELLEE

AMERICAN FARM BUREAU FEDERATION; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL MINING ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; UTILITY WATER ACT GROUP; FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, AMICI ON BEHALF OF APPELLANTS

Submitted: Dec. 11, 2014
Filed: Apr. 10, 2015

Before: LOKEN, BRIGHT, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Hawkes Co., Inc. (Hawkes), wishes to mine peat from wetland property owned by two affiliated companies in northwestern Minnesota. The United States Army Corps of Engineers derailed that plan when it issued an Approved Jurisdictional Determination ("JD") that the property constitutes "waters of the

United States" within the meaning of the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), and therefore appellants must have a permit to discharge dredged or fill materials into these "navigable waters." *See* 33 U.S.C. §§ 1344(a), 1362(7). Appellants brought this action seeking judicial review of the JD and now appeal the district court's grant of the government's motion to dismiss their Amended Complaint. The district court concluded that an approved JD, though the consummation of the Corps' jurisdictional decisionmaking process, was not a "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704. While the appeal was pending, a panel of the Fifth Circuit reached the same conclusion. *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), *cert. denied*, __ U.S. __, 135 S. Ct. 1548, __ L. Ed. 2d __, 83 U.S.L.W. 3291 (U.S. Mar. 23, 2015) (No. 14-493).

We conclude that both courts misapplied the Supreme Court's decision in *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012). Therefore, we reverse.

I.

The CWA requires a permit from the Corps to discharge dredged or fill materials into "navigable waters," and a permit from the Environmental Protection Agency (or an authorized state agency) to discharge any "pollutant" into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1342, 1344. The statute defines

"navigable waters" to mean "the waters of the United States," § 1362(7). This broad definition prompted the Corps and the EPA to make "sweeping assertions of jurisdiction" over every stream, ditch, and drain that can be considered a tributary of, and every wetland that is adjacent to, traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 726-727, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (plurality opinion).

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Supreme Court held that the Corps may require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." But in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), the Court rejected the Corps' assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate waters" where migratory birds are present. And in *Rapanos*, the Court concluded that the Corps' asserted jurisdiction over "wetlands based on adjacency to nonnavigable tributaries" went beyond its statutory authority. 547 U.S. at 782, 126 S. Ct. 2208 (Kennedy, J., concurring in the judgment). Because the Court's plurality and Justice Kennedy adopted different narrower tests to determine when wetlands are "waters of the United States," we held "that the Corps has jurisdiction over wetlands that satisfy either test" in *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

The CWA imposes heavy civil and criminal penalties on a person who discharges into navigable waters without a required permit, or in violation of an issued permit. *See* 33 U.S.C. § 1319; *Rapanos*, 547 U.S. at 721, 126 S. Ct. 2208. When the Corps or the EPA finds that a person is violating the CWA's discharge restrictions, or a permit issued under the CWA, the agency "shall issue an order requiring such person to comply," as in *Sackett*, or bring a civil enforcement action, as in *Riverside Bayview Homes* and *Rapanos*. *See* 33 U.S.C. §§ 1319(a)(3) (EPA) and 1344(s) (Corps). In *Sackett*, the EPA issued an administrative compliance order against a person for depositing fill into jurisdictional wetlands without a permit, ordering, among other remedies, that the site be restored. The EPA persuaded the lower courts the order was not subject to "pre-enforcement judicial review." Applying the test for determining a final agency action in *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), a unanimous Court held that the compliance order was a final agency action subject to immediate judicial review under the APA:

> [I]t is hard for the Government to defend its claim that the issuance of the compliance order was just "a step in the deliberative process" when the agency rejected the Sacketts' attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if

the EPA brings an enforcement action). 132 S. Ct. at 1373.

The question in this case is whether the Court's application of its flexible final agency action standard in *Sackett*[1] should also apply in this case, where appellants seek judicial review of an adverse JD without either completing the CWA permit process or risking substantial enforcement penalties by mining peat and discharging dredged or fill materials without a permit. That question requires a close look at the allegations in their Amended Complaint.

II.

In reviewing the district court's Rule 12(b)(6) dismissal, we accept as true the facts alleged in the Amended Complaint. Hawkes is in the business of mining and processing peat, a "wetland dependant" activity regulated in Minnesota through permits issued by the Minnesota Department of Natural Resources. Pierce Investment Co. and LPF Properties, LLC, have property interests in a 530-acre parcel in northwestern Minnesota that contains high quality peat near

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[1] The Court has consistently taken a "pragmatic" and "flexible" approach to the question of finality, and to the related question whether an agency action is ripe for judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *accord Bell v. New Jersey*, 461 U.S. 773, 779, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983); *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 200-201, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

Hawkes's existing peat-mining operations. All three companies are owned by members of the Pierce family.

After obtaining an option to purchase the property subject to regulatory approval, Kevin Pierce and Hawkes met with Corps and MDNR representatives to discuss Hawkes's plan to expand its operations to include the property, which would extend the life of its peat mining ten to fifteen years. In December 2010, Hawkes applied to the Corps for a CWA permit. At a January 2011 meeting, Corps representatives urged Pierce to abandon his plan, emphasizing the delays, cost, and uncertain outcome of the permitting process. Pierce responded that he had an option to purchase and intended to proceed. In March, the Corps sent a letter advising it had made a "preliminary determination" the wetland is a regulated water of the United States and, "at a minimum," an environmental assessment would be required. At an April meeting, a Corps representative told Pierce a permit would take years and the process would be very costly. During a site visit in early June, another Corps representative told a Hawkes employee that "he should start looking for another job." In August, the Corps sent Hawkes a letter advising that nine additional information items costing more than $100,000 would be needed, including hydrological and functional resource assessments and an evaluation of *upstream* potential impacts. In November, Corps representatives met with the land owner and urged that he sell the property to a "wetlands bank," advising that an environmental impact

statement would likely be required, delaying the issuance of any permit for several years.

Appellants challenged the Corps' preliminary determination. In November, the Corps provided a "draft" JD concluding the property was connected by a "Relatively Permanent Water" (a series of culverts and unnamed streams) that flowed into the Middle River and then into the Red River of the North, a traditional navigable water some 120 miles away. Appellants' wetland consultant pointed out numerous errors in the analysis. Nonetheless, in February 2012 the Corps issued an Approved JD concluding the property was a water of the United States because of its "significant nexus" to the Red River. *See* 33 C.F.R. §§ 320.1(a)(6), 325.9. Appellants responded by filing a timely administrative appeal. *See* 33 C.F.R. §§ 331.2, 331.3, 331.6.

In October 2012, the Corps' Deputy Commanding General for Civil and Emergency Operations sustained the appeal, concluding after detailed analysis that the administrative record "does not support [the District's] determination that the subject property contains jurisdictional wetlands and waters," and remanding to the District "for reconsideration in light of this decision." On December 31, 2012, the Corps nonetheless issued a Revised JD concluding, without additional information, that there is a significant nexus between the property and the Red River of the North, and advising appellants that the Revised JD was a

"final Corps permit decision in accordance with 33 C.F.R. § 331.10," which meant their administrative remedies were exhausted. *See* 33 C.F.R. § 331.12.

Appellants then filed this action seeking judicial review of the Revised JD, alleging that it does not meet either of the applicable tests for the assertion of CWA jurisdiction established in *Rapanos*—the plurality's "relatively permanent" test, or Justice Kennedy's "significant nexus" test. The Corps moved to dismiss the complaint, arguing the Revised JD was not a final agency action and the issue was not ripe for judicial review. The district court dismissed the complaint for lack of final agency action. *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 963 F Supp. 2d 868, 871, 878 (D. Minn. 2013). This appeal followed.

III.

The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). When an agency action is final and, if final, appropriate for judicial review are issues that have arisen in a variety of federal agency contexts in the past one hundred years. *See, e.g., Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 70-71, 91 S. Ct. 203, 27 L. Ed. 2d 203

(1970); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 132 n.11, 143-44, 59 S. Ct. 754, 83 L. Ed. 1147 (1939). In *Bennett*, 520 U.S. at 177-78, 117 S. Ct. 1154, the Court synthesized its prior precedents on the first issue:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

A. Though the Corps argues otherwise, we agree with the district court (and every court to consider the issue) that the Revised JD clearly meets the first *Bennett* factor—it was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority. *See Belle Co.*, 761 F.3d at 389-90; *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591-93 (9th Cir. 2008). The regulations provide that an Approved JD "constitute[s] a Corps final agency action." 33 C.F.R. § 320.1(a)(6). The Corps' Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site," and stated that an Approved JD "can be relied upon by a landowner, permit applicant, or

other affected party for five years" (quotation omitted). Jurisdictional determinations and permitting decisions are discrete agency actions; a party may obtain a JD without seeking a permit, and may obtain a permit without seeking an Approved JD. *Fairbanks*, 543 F.3d at 593. Thus, when an Approved JD has issued, "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication." *Port of Bos.*, 400 U.S. at 70-71, 91 S. Ct. 203; *see Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998). The possibility that the agency might informally reconsider its decision "does not suffice to make an otherwise final agency action non-final." *Sackett*, 132 S. Ct. at 1372 (quotation omitted).

B. The district court concluded that the Approved JD does not satisfy *Bennett's* second factor because it is not an agency action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" In *Sackett*, the EPA compliance order required petitioners to restore property they had altered without a permit and subjected them to the risk of $75,000 per day in penalties if they chose to disobey. By contrast, the district court reasoned, appellants "face no such obligations or changes in their rights as a result of their jurisdictional determination." They "may pursue a permit without a disadvantage." 963 F Supp. 2d at 876-77.

1. In our view, this analysis seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action. Numerous Supreme Court precedents confirm that this is not a basis on which to determine whether "rights or obligations have been determined" or that "legal consequences will flow" from agency action.

—In *Bennett*, the Court held that a Fish and Wildlife Service biological opinion satisfied the second factor because it required the Bureau of Reclamation to comply with its conditions and thereby had "direct and appreciable legal consequences." 520 U.S. at 158, 178, 117 S. Ct. 1154. Though not self-executing, the biological opinion was mandatory. Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.

—In *Abbott Laboratories*, the Court held that prescription drug labeling regulations were a final agency action subject to pre-enforcement judicial review because they "purport to give an authoritative interpretation of a statutory provision" that puts drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing "misbranded" drugs. 387 U.S. at 152-53, 87 S. Ct. 1507.

—In *Frozen Food Express v. United States*, 351 U.S. 40, 76 S. Ct. 569, 100 L. Ed. 910 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42, 76 S. Ct. 569. As in this case, the order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott Labs.*, 387 U.S. at 150, 87 S. Ct. 1507. The Court nonetheless held the order reviewable because the "determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact"; it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Frozen Food Express*, 351 U.S. at 43-44, 76 S. Ct. 569. Here, the Revised JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston*, 400 U.S. at 70-71, 91 S. Ct. 203, the Court rejected as having "the hollow ring of another era" the contention that an "order lacked finality because it had no independent effect on anyone," citing *Frozen Food Express*.

—In *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942), the Court held that FCC regulations barring

the licensing of stations that enter into network contracts, though not self-executing, were subject to immediate review. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose application for licenses the regulations will cause to be rejected." *Id.* at 422, 62 S. Ct. 1194. Here, the Revised JD alters and adversely affects appellants' right to use their property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA. Though the Revised JD is not-self-executing, "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett*, 132 S. Ct. at 1373.

2. The Corps argues, and the district court further concluded, that the Revised JD is not a final agency action "for which there is no other adequate [judicial] remedy " 5 U.S.C. § 704, because appellants have two other adequate ways to contest the Corps' jurisdictional determination in court—complete the permit process and appeal if a permit is denied, or commence peat mining without a permit and challenge the agency's authority if it issues a compliance order or commences a civil enforcement action. These other CWA remedies were held not to preclude judicial review of the EPA compliance order in *Sackett*, 132 S. Ct. at 1372.

In this case, the contention ignores the prohibitive cost of taking either of these alternative actions to obtain judicial review of the Corps' assertion of CWA jurisdiction over the property. First, as a practical matter, the permitting option is prohibitively expensive and futile. The Supreme Court reported in *Rapanos*, 547 U.S. at 721, 126 S. Ct. 2208, that the average applicant for an individual Corps permit "spends 788 days and $271,596 in completing the process." Moreover, the Amended Complaint alleged that the Corps' District representatives repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat *would ultimately be refused.* In our view, this alone demonstrates that the second *Bennett* factor is satisfied. Moreover, even if appellants eventually complete the permit process, seek judicial review of the permit denial, and prevail, they can never recover the time and money lost in seeking a permit they were not legally obligated to obtain. *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 868 (8th Cir. 2013).

Second, appellants' other option—commencing to mine peat without a permit and await an enforcement action—is even more plainly an inadequate remedy. Appellants "cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue" huge additional potential liability. *Sackett*, 132 S. Ct. at 1372. Because appellants were forthright in undertaking to obtain a permit, choosing now to ignore the Revised JD and commence peat mining

without the permit it requires would expose them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation. Thus, like the compliance order at issue in *Sackett*, the Revised JD increases the penalties appellants would risk if they chose to begin mining without a permit. *See* 33 U.S.C. § 1319(c).

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. For decades, the Corps has "deliberately left vague" the "definitions used to make jurisdictional determinations," leaving its District offices free to treat as waters of the United States "adjacent wetlands" that "are connected to the navigable water by flooding, on average, once every 100 years," or are simply "within 200 feet of a tributary." *Rapanos*, 547 U.S. at 727-28, 126 S. Ct. 2208, quoting a GAO report. The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was

contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD

is a final agency action and the issue is ripe for judicial review under the APA.[2]

The judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

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[2] The question of ripeness "turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co.*, 461 U.S. at 201, 103 S. Ct. 1713, quoting *Abbott Labs.*, 387 U.S. at 149, 87 S. Ct. 1507. The issues of ripeness and final agency action are distinct, but in this case, our analysis of the final agency action factors in *Bennett* resolves the ripeness issue as well.

KELLY, Circuit Judge, concurring.

I view whether a JD is reviewable under the APA as a close question. In *Sackett*, the Supreme Court concluded that a compliance order issued by the EPA "severely limits [petitioners'] ability to obtain a permit for their fill from the Army Corps of Engineers [because] [t]he Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so 'is clearly appropriate.'" *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367, 1372, 182 L. Ed. 2d 367 (2012) (internal citation omitted) (quoting 33 C.F.R. § 326.3(e)(1)(iv)).[3] The record in the present case does not reveal that a similar impediment to receiving a permit exists once a JD has been issued. In *Sackett*, the Corps had a published policy regarding the decreased likelihood of receiving a permit; here, the record includes case-specific facts, such as informal comments made by Corps representatives, suggesting that a permit application made by Hawkes might be "futile." *See* Majority Opinion, *supra*, op. at 1001. However, I question how much weight should be given to the futility of

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[3] "No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate." 33 C.F.R. § 326.3(e)(1)(iv)

the permit application for an individual applicant, or the time and cost spent applying, in determining whether or not the JD constitutes a final agency action. If a JD is a final agency action, an applicant who is *likely* to obtain a permit would still be in a position to seek judicial review of the JD. Similarly, it must be the case that were the Corps to take steps to make the permit process both more efficient and less costly, the reviewability of the JD would not change.

I also note other differences between the compliance order in *Sackett* and the JD in the present case. A compliance order, once issued, begins the accumulation of penalties (potentially doubled) for each day the landowner remains in violation. *Id.* A JD, however, has no such penalty scheme. Indeed, 33 U.S.C. § 1319(d), the CWA's enforcement section on civil penalties, makes no mention of JDs. While the existence of a JD may affect a court's assessment of a party's "good faith" while determining civil penalties, I agree with the other courts that have considered this issue that any penalties resulting from a JD are far more "speculative" than those threatened in *Sackett*. *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 392 (5th Cir. 2014); *see also, Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 595 (9th Cir. 2008). The Appellants fail to point to a single case in which increased civil penalties were levied against a party for ignoring a JD.

Despite these dissimilarities with the circumstances in *Sackett*, I agree that Hawkes is left without acceptable options to challenge the JD, absent judicial review. Hawkes's choice is to either (1) follow through on their peat-mining plans until either the EPA issues a compliance order or the Corps commences an enforcement action, to both of which Hawkes could raise lack of CWA jurisdiction as a defense; or (2) apply for a permit (on the grounds that no permit is required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an "adequate remedy" to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.

In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct.

at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil No. 13-107 ADM/TNL

HAWKES CO., INC., PIERCE INVESTMENT CO., AND LPF PROPERTIES, LLC, PLAINTIFFS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT

Aug. 1, 2013

MEMORANDUM OPINION AND ORDER

ANN D. MONTGOMERY, District Judge.

I. INTRODUCTION

On July 9, 2013, the undersigned United States District Judge heard oral argument on Defendant United States Army Corps of Engineers' (the "Corps") Motion to Dismiss [Docket No. 11]. Plaintiffs Hawkes Co., Inc. ("Hawkes"), Pierce Investment Co. ("Pierce"), and LPF Properties, LLC ("LPF") filed this action seeking a declaratory judgment and injunctive relief to challenge a jurisdictional determination

made by the Corps under the Clean Water Act ("CWA"). For the reasons stated herein, the Corps' motion is granted.

II. BACKGROUND

Plaintiffs Pierce and LPF own a 530 acre parcel of land in Marshall County, Minnesota (the "Property"). The Property contains peat, and because peat forms in wetlands, the Property is necessarily considered a wetland. Am. Compl. [Docket No. 7] ¶¶ 6, 7, 27. Plaintiff Hawkes seeks permission to mine peat from the Property for use in the construction of golf greens. Hawkes is already mining peat from nearby land, and intends to pay royalties to Pierce and LPF in exchange for permission to expand its mining operation onto the Property. All three companies are closely-held corporations owned by members of the Pierce family, and Kevin Pierce is an officer in all of the companies. *Id.* ¶¶ 8, 32-33.

On March 20, 2007, Kevin Pierce, representing Hawkes, met with the Corps and the Minnesota Department of Natural Resources ("MDNR") to discuss Hawkes' plan to mine peat on the Property. On January 15, 2008, the parties met again. At this second meeting, Hawkes informed the Corps and MDNR that the high quality peat available on the Property could support Hawkes' mining operation for another 10 to 15 years. *Id.* ¶¶ 35-37.

The CWA prohibits the discharge of materials into "navigable waters," which is broadly defined as "waters of the United States." 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). The Corps has interpreted the term "waters of the United States" to include wetlands adjacent to navigable waters. The Supreme Court has affirmed this interpretation. *See* 33 C.F.R. § 328.3; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985). The Corps has authority under the CWA to issue permits for the discharge of dredged or fill materials into navigable waters, including wetlands. *See* 33 U.S.C. § 1344. The Corps has also promulgated regulations which govern its decisionmaking processes in connection with CWA permits. *See* 33 C.F.R. § 320.1, et seq.

Hawkes' intended mining operation involves the filling or discharge of materials onto the Property. As a result, in December 2010, Hawkes applied for a permit from the Corps to begin mining. In January 2011, the parties met to discuss Plaintiffs' plans. The Corps attempted to dissuade Plaintiffs from expanding their mining operations, in part by stressing the time and cost involved in the permitting process. Am. Compl. ¶ 40.

On March 15, 2011, the Corps by letter informed Hawkes it had tentatively determined that the Property was connected to Red River of the North, a "water of the United States," and thus regulated by the

Corps under the CWA. Over the next several months, the parties met several times, and the Corps conducted a site visit of the Property. In connection with the permitting process, the Corps also requested Plaintiffs conduct a series of assessments relating to the Property, which Plaintiffs estimate will cost about $100,000. Am. Compl. ¶¶ 41-46, Exs. A, B.

On November 8, 2011, the Corps sent Plaintiffs a preliminary version of its jurisdictional determination for the Property (sometimes referred to as the "JD"). The preliminary JD stated that CWA jurisdiction existed over the Property because it was a wetland connected to a "relatively permanent water," which in turn connected to the Red River of the North, a navigable water.[1] Plaintiffs responded by letter, arguing

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[1] For jurisdiction to exist under the CWA, the wetland at issue must have some connection to a "traditionally navigable water." The nature of this connection is somewhat in dispute due to *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). In *Rapanos*, the four justice plurality opinion held that for jurisdiction to exist under the CWA, the wetland must connect to a traditionally navigable water by "relatively permanent, standing or continuously flowing bodies of water." *Id.* at 739, 126 S. Ct. 2208. Justice Kennedy, in a concurring opinion, wrote that jurisdiction exists if the wetland has a "significant nexus" to traditional navigable waters. *Id.* at 778, 126 S. Ct. 2208; *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).

The Eighth Circuit Court of Appeals has held that either test can establish CWA jurisdiction. *United States v. Bailey*, 571 F.3d

no jurisdiction existed because the Property did not connect to a "relatively permanent water." Am. Compl. ¶ 49.

On February 7, 2012, the Corps issued an Approved Jurisdictional Determination (the "Approved JD") in which it apparently abandoned the "relatively permanent water" rationale and instead concluded a "significant nexus" existed between the Property and the Red River of the North. An "approved jurisdictional determination" is the first formal decision the Corps makes with regard to jurisdiction, and it is appealable to a "Review Officer" within the agency. *See* 33 C.F.R. §§ 331.2, 331.3.

On April 4, 2012, in accordance with CWA regulations, Plaintiffs appealed the Approved JD to the designated Corps Review Officer. Am. Compl. ¶ 51. On October 24, 2012, the Corps issued an appellate decision in which it rejected several of the Plaintiffs' appeal arguments. However, the appeal concluded that the Corps had failed to evaluate the Property's chemical, physical, and biological effects on the Red River of the North, and thus had not established a significant

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791, 799 (8th Cir. 2009). The Environmental Protection Agency and the Corps have similarly issued informal guiding documents in which they have stated an intent to exercise jurisdiction under both tests. *See* U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in Rapanos* (Dec. 2, 2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf.

nexus. As a result, the JD was remanded to the St. Paul District of the Corps for further factfinding. *Id.* at Ex. C.

On December 31, 2012, the Corps issued a Revised Approved Jurisdictional Determination (the "Revised JD") in which it again concluded CWA jurisdiction existed. *Id.* at ¶ 54. The Corps informed Plaintiffs that the Revised JD constituted the "final Corps approved jurisdictional decision," meaning no further appeals of jurisdiction could be taken. Cameron Decl. [Docket No. 13] Ex. 1. On January 11, 2013, Plaintiffs filed this action seeking review of the Revised JD.

III. DISCUSSION

A. Motion to Dismiss Standard

Rule 12 of the Federal Rules of Civil Procedure states that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P 12(b)(6). The court construes the pleadings in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994) (citation omitted). And although the court may not consider matters outside the pleadings at this stage, "documents necessarily embraced by the complaint are not matters outside the pleading[s]." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (quotation omitted).

B. Review of Final Agency Actions

Under the Administrative Procedure Act (APA), "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. For an agency action to be considered "final," it must satisfy two conditions. First, the action must "mark the consummation of the agency's decisionmaking process," meaning it must be more than "tentative or interlocutory" in nature. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quotations and citations omitted). Second, the action must be one "by which rights or obligations have been determined," or one from which "legal consequences will flow." *Id.* at 178, 117 S. Ct. 1154.

The parties do not dispute that Plaintiffs here could obtain judicial review by pursuing the permitting process, as Corps regulations expressly make the final permit decision reviewable under the APA. *See* 33 C.F.R. § 331.12. However, Plaintiffs argue that by itself, a jurisdictional determination qualifies as a "final agency action" subject to immediate judicial review.

C. Judicial Review of Jurisdictional Determinations

Although no Eighth Circuit court has yet ruled on the issue, several other federal courts have held that a jurisdictional determination is not a "final agency action," and thus not subject to immediate judicial

review. *See, e.g., Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008); *Greater Gulfport Props., LLC v. U.S. Army Corps of Eng'rs*, 194 Fed. Appx. 250 (5th Cir. 2006) (unpublished); *Coxco Realty, LLC v. U.S. Army Corps of Eng'rs*, No. 3:06-cv-416-s, 2008 WL 640946, at *4-5 (W.D. Ky. Mar. 4, 2008); *Hampton Venture No. One v. United States*, 768 F Supp. 174, 175-76 (E.D. Va. 1991); *St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs*, 314 F Supp. 2d 1238, 1244-45 (S.D. Fla. 2004); *Child v. United States*, 851 F Supp. 1527, 1534-35 (D. Utah 1994); *Lotz Realty Co. v. United States*, 757 F Supp. 692, 695-98 (E.D. Va. 1990); *Acquest Wehrle LLC v. United States*, 567 F Supp. 2d 402, 409-411 (W.D.N.Y. 2008); *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, No. 12-247-BAJ-SCR, 2013 WL 773730, at *2-4 (M.D. La. Feb. 28, 2013).

Fairbanks illustrates the above-cited cases' reasoning for denying judicial review of jurisdictional determinations. Like Plaintiffs in this case, the plaintiff in *Fairbanks* sought judicial review after the Corps issued an approved jurisdictional determination for the wetlands at issue. *Fairbanks*, 543 F.3d at 593-94. In deciding whether a jurisdictional determination is a "final agency action," the Ninth Circuit Court of Appeals found that while the first *Bennett* condition was satisfied, the second was not. The court also concluded that the jurisdictional determination did not impair the plaintiff's ability to seek judicial review

through the permitting process. *See Bennett*, 520 U.S. at 177-78, 117 S. Ct. 1154; 5 U.S.C. § 704.

Considering the first *Bennett* condition, the Ninth Circuit held that the plaintiff's jurisdictional determination represented a consummation of the Corps' decisionmaking process. The court reasoned that when the Corps issues a jurisdictional determination and upholds it on administrative appeal, the Corps itself treats the determination as "final" and will not reopen it absent new information supporting a revision. *Fairbanks*, 543 F.3d at 592. The Ninth Circuit also found that Corps regulations treat the jurisdictional determination as a separate administrative process from the subsequent permit decision, with the latter being initiated at-will by the permit applicant. Practically speaking, when an applicant requests a permit, his application does not reopen or otherwise disturb the Corps' earlier jurisdiction decision. *Id.* at 593. As a result, the *Fairbanks* court held that the jurisdictional determination satisfied the first *Bennett* condition.

However, the Ninth Circuit ultimately held that a jurisdictional determination was not a "final agency action"—and thus not subject to immediate judicial review—because it did not alter a party's rights or obligations. *See id.* at 591-94. A jurisdictional determination, the court held, "does not itself command [a party] to do or forbear anything; as a bare statement of the agency's opinion, it can be neither the

subject of 'immediate compliance' nor of defiance." *Id.* at 591-92 (citation omitted). A finding of jurisdiction in this context, the court held, is akin to recognizing already-existing facts about the nature of the wetlands at issue. When the Corps finds jurisdiction, it "does not alter physical reality or the legal standards used to assess that reality." *Id.* at 594. In other words, the Corps' jurisdictional determination clarifies a plaintiff's position but does not alter it. As a result, the jurisdictional determination fails the second *Bennett* condition, and the determination is not subject to judicial review.

As part of its analysis, the Ninth Circuit briefly noted its holding did not impair the plaintiff's ability to challenge CWA jurisdiction. *Id.* at 594-95. The plaintiff could still challenge jurisdiction when judicial review was appropriate, such as in connection with a permit application or an enforcement proceeding. *See id.* As a result, the plaintiff was not without "other adequate remedy in a court." *See id.*; 5 U.S.C. § 704.

D. Plaintiffs' Appeal of the Revised Jurisdictional Determination

As discussed below, Plaintiffs' jurisdictional determination satisfies the first *Bennett* condition, but not the second.

1. Consummation of the Agency's Decisionmaking Process

The Corps argues *Fairbanks* reached the correct end result, but disagrees with the Ninth Circuit's conclusion that a jurisdictional determination marks the consummation of the agency's decisionmaking process. Instead, the Corps urges the Court to view jurisdictional determinations as the beginning, or at least as some non-definitive, stage of the permit process. In response, Plaintiffs note that *Fairbanks*, a case on which the Corps relies, held that a jurisdictional determination was the consummation of a Corps decisionmaking process. Plaintiffs further argue the language of Corps regulations themselves indicate an intent to treat jurisdictional determinations as final.

Plaintiffs' jurisdictional determination marked the consummation of the Corps' decisionmaking process, and as such satisfies the first *Bennett* condition. Despite the Corps' argument to the contrary, the jurisdictional determination process is not—as this case demonstrates—necessarily contiguous with a permit application process. Here, Plaintiffs received the Revised JD but have not yet decided whether to pursue a permit. At this point, Plaintiffs could choose to abandon their mining operation. If that were to occur, Plaintiffs would not have abandoned the administrative process at a midpoint. The Corps' jurisdictional determination would remain in place regardless of future operations, changes in ownership, or complete

inactivity on the Property. The only ways in which the Revised JD could be altered would be if: (1) new information surfaced regarding the Property, or (2) a party later successfully challenged jurisdiction in connection with a permit application or enforcement action. The jurisdictional determination is thus a discrete decision.

The possibility of the Corps revising its jurisdictional determination does not, as the Corps urges, transform this determination into an advisory opinion. The Ninth Circuit in *Fairbanks* concluded that the possibility of new information arising did not suggest that the determination "might be subject to subsequent revision consideration or modification." *Fairbanks*, 543 F.3d at 592 & n.4; *see also Coxco*, 2008 WL 640946, at *5 (holding jurisdictional determination may mark consummation of jurisdiction decisionmaking process). In other administrative and judicial contexts, a final decision may be reopened if new information comes to light. *See, e.g.*, Fed. R. Crim. P 33(b)(1) (governing motion for new trial based on newly discovered evidence); 20 C.F.R. § 404.989 (allowing for reopening of otherwise final Social Security benefits decisions based on new evidence or showing of error). But, for very practical and equitable reasons, the chance of new information altering a final decision does not justify treating the decision as entirely advisory. That is also the case here.

The language of Corps regulations further supports this conclusion. The Corps concedes CWA regulations describe a jurisdictional determination as "a Corps final agency action." 33 C.F.R. § 320.1(a)(6). However, the Corps argues that this language does not mean the Corps views jurisdictional determinations as final for APA purposes, but rather only as "final" in the sense the public may rely on the determination.[2] *See* Final Rule for Regulatory Programs of the Corps of Engr's, 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986). The Corps' argument, as Plaintiffs note, actually supports viewing jurisdictional determinations as the consummation of a decisionmaking process. If a jurisdictional determination is "final" in the sense the public may rely on it, the determination must be more definitive than an advisory opinion.

2. Determines a Party's Rights or Obligations

Although Plaintiffs' Revised JD may mark the consummation of a Corps' decisionmaking process, it does not determine Plaintiffs' rights or obligations, and thus does not satisfy the second *Bennett* condition. Plaintiffs argue *Bennett* stressed the practical nature of its articulated finality test, focusing on the legal consequences of the agency decision even if the decision itself did not expressly alter legal rights. *See Ben-*

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[2] This argument also reflects the overall regulatory scheme, as 33 C.F.R. § 331.12 states administrative remedies have not been exhausted for APA purposes until a final permit decision is reached under § 331.10.

nett, 520 U.S. at 169-70, 117 S. Ct. 1154. Because the Corps has found jurisdiction, Plaintiffs argue, their options have narrowed to a set of difficult alternatives. Plaintiffs may proceed with mining and risk substantial liability; they may seek a permit through a lengthy and costly process; or they may abandon their mining plans altogether. As a result, Plaintiffs argue the Revised JD has materially altered their legal position. The Corps responds by arguing, as *Fairbanks* held, that jurisdictional determinations do not alter a party's legal obligations so much as mark the boundaries for future decisions.

Plaintiffs' jurisdictional determination does not fix their rights or obligations. The Revised JD does not order Plaintiffs to take any kind of action. Although Plaintiffs may want to obtain a permit if they wish to expand their mining operations, the Corps has in no way obligated them to do so. *See Fairbanks*, 543 F.3d at 594; *St. Andrews*, 314 F Supp. 2d at 1244-45; *Belle*, 2013 WL 773730, at *4. While Plaintiffs do have a difficult choice to make regarding how to proceed, their options did not substantially change because of the jurisdictional determination. The Property is undisputedly a wetland, and it has a potential connection to a navigable water. The Revised JD did not change these physical characteristics. Nor did it affect the legal standards used by agencies and courts in determining where the CWA applies. Even if Plaintiffs had never approached the Corps, Plaintiffs would have still needed to decide whether to begin

mining on a wetland possibly protected by the CWA or to pursue a permit. As a result, the Revised JD does not satisfy the second *Bennett* condition.

E. Compliance Orders and *Sackett*

Neither Plaintiffs nor the Court have identified a single decision contrary to the holding of *Fairbanks* and the other cases cited above. However, Plaintiffs argue the Supreme Court's recent holding in *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012), overruled these decisions.[3] Without obtaining a jurisdictional determination or permit, the petitioners in *Sackett* filled rocks and dirt onto part of their residential lot in preparation for building a house. In response, the EPA issued a compliance order in accordance with 33 U.S.C. § 1319.[4] In the compliance order, the EPA determined that the petitioners' property fell under CWA jurisdiction, and also that the

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[3] The Court in *Belle*, 2013 WL 773730, at *4, specifically distinguished *Sackett*, holding jurisdictional determinations did not have the binding effect of compliance orders. Nevertheless, Plaintiffs argue *Belle* reached the wrong result, and that *Sackett* applies here.

[4] The EPA and the Corps have concurrent jurisdiction to enforce the CWA. The EPA has the authority under the Act to issue compliance orders, binding decisions which the EPA can then choose to enforce in court by bringing an enforcement action. *See* 33 U.S.C. § 1319(a, b). Prior to *Sackett*, courts had held that a party subject to a compliance order had no judicial recourse until the EPA brought a civil action to enforce the order. *See, e.g., Hoffman Grp. v. EPA*, 902 F.2d 567, 569-70 (7th Cir. 1990).

petitioners had violated the Act. *Id.* at 1370-71. The petitioners sought review of the compliance order, arguing it was a "final agency action" under Chapter 7 of the APA and thus subject to judicial review.

The Supreme Court sided with the petitioners. The Court held the compliance order bore the hallmarks of a "final agency action" under the two *Bennett* conditions. First, the compliance order marked the consummation of the EPA's decisionmaking process, because the petitioners were not entitled to any further administrative review. *Id.* at 1372. Second, the compliance order determined the petitioners' rights and obligations. The order legally obligated the petitioners to "restore" their land in accordance with an EPA restoration plan, it required them to provide the EPA with access to the property, and it required them to provide EPA employees with "access and documentation related to the conditions of the site." *Id.* at 1371 (citation omitted). If the petitioners did not comply, they would immediately risk accruing substantial, daily penalties. *Id.* at 1372. In addition, the Court noted that Corps regulations made it substantially more difficult for the petitioners to obtain a permit after receiving a compliance order. *Id.* (citing 33 C.F.R. § 326.3(e)(1)(iv)).

1. *Bennett* Conditions Under *Sackett*

Plaintiffs argue the Revised JD satisfies the same criteria for a "final agency action" as the compliance order reviewed by the Supreme Court in *Sackett*. As

a result, Plaintiffs argue the Court should extend *Sackett's* holding to apply to all final CWA jurisdictional determinations as well. The Corps responds that *Fairbanks* and the other above-cited cases have correctly stated the law, and that because jurisdictional determinations are distinguishable from compliance orders, *Sackett* should have no effect here. Plaintiffs are unable to demonstrate how *Sackett* applies to jurisdictional determinations.

As discussed above, the jurisdictional determination satisfies the first *Bennett* condition.[5] With regard to the second *Bennett* condition, however, Plaintiffs' Revised JD is distinguishable from the petitioners' compliance order in *Sackett*. The compliance order demanded the petitioners restore their property in accordance with a restoration plan set by the EPA, and grant the EPA access to both the land and records at issue. *Sackett*, 132 S. Ct. at 1371-72. If the petitioners chose to disobey the compliance order, they risked accruing up to $75,000 per day in penalties, which the EPA could recover if it subsequently prevailed in an enforcement action. *Id.* at 1370.

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[5] Regarding the first *Bennett* condition, *Sackett* and *Fairbanks* actually adopt the same reasoning in concluding a compliance order and a jurisdictional determination mark the consummations of their respective decisionmaking processes. *Sackett* held the "mere possibility" of an agency revisiting and revising its original decision based on new information does not "suffice to make an otherwise final agency action nonfinal." *Sackett*, 132 S. Ct. at 1372. As discussed above, *Fairbanks* held in agreement on this point.

As discussed above in Section III.D.2., Plaintiffs face no such obligations or changes in their rights as a result of their jurisdictional determination. Plaintiffs attempt to avoid this conclusion by arguing the threat of liability comprises a material change in their legal obligations, just as it did for the petitioners in *Sackett*. *See Sackett*, 132 S. Ct. at 1371. If Plaintiffs forgo the costly permit process and begin mining, they argue, they will face the risk of the Corps suing them. However, the compliance order in *Sackett* "started the clock" on the petitioners' exposure to liability, adding potentially tens of thousands of dollars per day in penalties pending restoration of the property. *See id.* In this case, the jurisdictional determination has not exposed Plaintiffs to liability, nor made any demands of them. And if an enforcement action was brought against them, Plaintiffs would not face substantial—and automatically accrued—liability for their actions.[6] Thus, the "specter of potential liability" was

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[6] At the hearing, Plaintiffs argued that proceeding without a permit when the Corps has already determined jurisdiction could put Plaintiffs at risk of steeper penalties and even criminal liability if the Corps succeeded in an enforcement action, because violating the CWA after gaining knowledge of CWA jurisdiction could demonstrate Plaintiffs' bad faith. Whether a particular agency action may be used as evidence against a party in a subsequent proceeding does not amount to a change in that party's rights or obligations, nor is it fairly characterized as a legal consequence. *See Fairbanks*, 543 F.3d at 595 ("[T]he possibility that Fairbanks might someday face a greater risk of increased fines should it proceed without regard to the Corps' assertion of jurisdiction does not

much more concrete for the petitioners in *Sackett* than it is here. Pls.' Mem. Opp. [Docket No. 26] 23; *see Lotz*, 757 F Supp. at 696 (holding the permitting process did not impose the sort of "immediate and devastating consequences" which might amount to a determination of rights or obligations).

Also unlike the petitioners in *Sackett*, Plaintiffs may pursue a permit without a disadvantage. The compliance order "severely" limited the petitioners' ability to obtain a permit from the Corps. *Sackett*, 132 S. Ct. at 1372. Here, the jurisdictional determination has not affected Plaintiffs' ability to pursue a permit. And Plaintiffs' description of the permit process as an unending, unreasonably expensive procedural nightmare is unpersuasive. Undoubtedly, pursuing a permit comes at a significant price, and it will take time before Plaintiffs may challenge the Revised JD through this process. But, as another court held in a relevant context, "[t]he possibility that an agency may make an error that is beyond the effective reach of a court is part of the price we pay for the advantages of an administrative process." *Thermal Ecology Must be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970). Although Plaintiffs might prefer a faster or less expensive way to challenge the Revised JD, the law views the permitting process as a proper procedural juncture to access judicial review in con-

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constitute a *legal* consequence of the approved jurisdictional determination.") (emphasis original).

nection with the CWA. *See, e.g., Fairbanks*, 543 F.3d at 594-95.

2. Adequacy of Judicial Remedies

In addition to considering the *Bennett* conditions, *Sackett* also considered whether the petitioners were left without "other adequate remedy in a court." *Id.* at 1372 (quoting 5 U.S.C. § 704). Generally, the party seeking to alter wetlands subject to the CWA may seek judicial review by one of two methods. First, he may proceed with the planned development or other alteration without consulting the Corps or the EPA. The EPA may then choose to bring an enforcement action against him, which would bring the party into court. *See* 33 U.S.C. § 1319; 33 C.F.R. §§ 326.3, 326.5. The Court in *Sackett* rejected this option, holding that waiting to be sued while incurring potentially significant penalties was not a sufficient remedy. *See generally Sackett*, 132 S. Ct. at 1372-74.

Second, the party may apply for a permit from the Corps, and if the permit is denied through the administrative process, he may file suit. *See* 33 C.F.R. §§ 331.10, 331.12. The Supreme Court held that this was not an adequate remedy for the petitioners in *Sackett*, because the EPA, a separate agency, had already issued a compliance order. *Id.* at 1372 ("The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency.").

Neither of these "dead ends" apply to Plaintiffs. First, unlike the petitioners in *Sackett*, Plaintiffs are not at the mercy of the Corps while they continue to accrue liability. On the contrary, Plaintiffs may choose if future administrative proceedings regarding the Property will occur and Plaintiffs will not accrue liability in the meantime. Unlike the petitioners, Plaintiffs have the ability to "initiate [the] process" which will bring them before the Court. *See Sackett*, 132 S. Ct. at 1372.

Regarding the second remedy, as noted, Plaintiffs have the unhindered option of pursuing a permit from the Corps. Both *Sackett* and *Fairbanks* viewed the permit process as a proper avenue after which judicial review of agency action under the CWA was appropriate. *See Sackett*, 132 S. Ct. at 1372; *Fairbanks*, 543 F.3d at 594-95; *see also Coxco*, 2008 WL 640946, at *5. *Sackett* found the permit process inadequate only because it would not serve to remedy the compliance order already issued by the EPA, a separate agency. *Sackett*, 132 S. Ct. at 1372. In this case, Plaintiffs face no such dilemma.

Finally, Plaintiffs now have a third avenue to judicial review. If Plaintiffs choose to begin mining without a permit and the government issues a compliance order, Plaintiffs may, as a result of *Sackett's* holding, seek immediate judicial review of the compliance order and resolve the status of their operations. Because the Revised JD does not satisfy both *Bennett* condi-

tions, and because Plaintiffs have "other adequate remedy in a court," the determination is not reviewable at this time.

F. Ripeness

Both parties offer brief arguments regarding why the doctrine of ripeness might also determine the outcome of this motion. Because the Court holds judicial review is not appropriate for the reasons stated above, it declines to reach the issue of ripeness.

IV CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion to Dismiss [Docket No. 11] is **GRANTED**; and,

2. All claims in the Amended Complaint [Docket No. 7] are **DISMISSED.**

LET JUDGMENT BE ENTERED ACCORDINGLY

APPENDIX C

[SEAL OMITTED]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL MN 55101-1678

REPLY TO ATTENTION OF

Operations

Regulatory (2007-01914-DJS) Dec. 31, 2012

Mr. Kevin Pierce
Hawkes Peat Company
P.O. Box 14111
Grand Forks, North Dakota 58208

Dear Mr. Pierce:

The U.S. Army Corps of Engineers, St. Paul District (District) has completed our reevaluation of the approved jurisdictional determination (AJD) issued to you on February 7, 2012 in accordance with the appeal decision provided by the Mississippi Valley Division Commander on October 24, 2012. As you are aware, the Division Commander remanded the case back to the District for reconsideration and reevaluation of our determination that the wetlands on your property along with other similarly situated wetlands adjacent to the tributary have a significant effect on the chemi-

cal, biological, and physical integrity of the Red River of the North. Based on our reevaluation, we have affirmed our previous determination that the wetlands on your property have a significant nexus with the Red River of the North and are thus waters of the United States. A copy of the revised AJD is provided for your records.

The District Engineer's decision made pursuant to the Division Engineer's remand of the appealed action becomes the final Corps permit decision in accordance with 33 C.F.R. 331.10.

If you have any questions, contact Dan Seemon in our St. Paul office at (651) 290-5380. In any correspondence or inquiries, please refer to the Regulatory number shown above.

Sincerely,

/s/ KELLY [ILLEGIBLE]
[*for*] TAMARA E. CAMERON
Chief, Regulatory Branch

Copy furnished:

T. Acuff, CEMVD-PD-KM

EXECUTIVE SUMMARY
MVP RESPONSE TO REMAND OF APPROVED JURISDICTIONAL DETERMINATION, CORPS FILE NUMBER MVP-2007-01914-DJS
(HAWKES PEAT COMPANY, INC.)

BACKGROUND

Mr. Kevin Pierce appealed the approved jurisdictional determination (AJD) prepared by the St. Paul District Regulatory Branch (District). Mr. Pierce alleged that a significant nexus does not exist between the 155 acres of wetlands on his property and the Red River of the North.

On October 24, 2012 the Division Commander issued a decision on the appeal and remanded the case back to the District for reconsideration. The remand directed the District to review the administrative record and its decision that the wetlands on Mr. Pierce's property along with other similarly situated wetlands adjacent to the tributary has a significant effect on the chemical, physical, and biological integrity of the Red River of the North. chemical, physical, or biological integrity of the Red River of the North.

ACTION REQUIRED

OP-R staff has completed the additional analyses and reviews in accordance with the remand and has determined that the wetlands located on Mr. Pierce's property have a significant effect on the chemical, physical, and biological integrity of the Red River of the North.

A revised and updated AJD has been prepared and will be transmitted to Mr. Pierce. A copy of the transmittal letter and the revised AJD will be provided to CEMVDPD-KM (Tonya Acuff) in accordance with the instructions from the Division Commander.

Pursuant to our regulations, the final Corps decision is the District Engineer's decision made pursuant to the Division Engineer's remand of the appealed action.

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD):

B. ST PAUL, MN DISTRICT OFFICE, FILE NAME, AND NUMBER: 2007-01914-DJS, Hawkes Peat, Mercil Site

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Minnesota

County/parish/borough: Marshall

City: Newfolden

Center coordinates of site (lat/long in degree decimal format): Lat. 48.417373° N, Long. -96.272519° W

Universal Transverse Mercator: Zone 16

Name of nearest waterbody: Unnamed tributary to the Middle River

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Red River of the North

Name of watershed or Hydrologic Unit Code (HUC): 09020309

☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☒ Office (Desk) Determination. Date: 12/20/2011

☒ Field Determination. Date(s): 6/1/2011 & 12/1/2011

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]

☐ Waters subject to the ebb and flow of the tide.

☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There Are "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. **Waters of the U.S.**

   a. **Indicate presence of waters of U.S. in review area (check all that apply):**[1]

   ☐ TNWs, including territorial seas

   ☐ Wetlands adjacent to TNWs

   ☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs

   ☐ Non-RPWs that flow directly or indirectly into TNWs

   ☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.

[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

☒ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

☐ Impoundments of jurisdictional waters

☐ Isolated (interstate or intrastate) waters, including isolated wetlands

b. **Identity (estimate) size of waters of the U.S. in the review area:**

Non-wetland waters: linear feet: width (ft) and/or acres. Wetlands: 155 acres.

c. **Limits (boundaries) of jurisdiction** based on: **Not established at this time.** Elevation of established OHWM (if known):

2. **Non-regulated waters/wetlands (check if applicable):**[3]

☐ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain:

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[3] Supporting documentation is presented in Section III.F

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1 only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**
   Identify TNW:

   Summarize rationale supporting determination:

2. **Wetland adjacent to TNW**
   Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non- navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tribu-

taries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus

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[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both on-site and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

   (i) **General Area Conditions:**

   Watershed size: **785 square miles**

   Drainage area: **2.4 square miles**

   Average annual rainfall: **21.2 inches**

   Average annual snowfall: **46.7 inches**

   (ii) **Physical Characteristics:**

   (a) Relationship with TNW:

   ☐ Tributary flows directly into TNW.

   ☒ Tributary flows through 2 tributaries before entering TNW

   Project waters are 30 (or more) river miles from TNW.

Project waters are 1 (or less) river miles from RPW.

Project waters are 30 (or more) aerial (straight) miles from TNW

Project waters are 1 (or less) aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW[5]: The wetlands in the review area discharge to a man-made non-jurisdictional drainage feature that flows approximately 512 feet to an unnamed tributary to the Middle River. The tributary then flows to the Middle River a perennial tributary of the Red River, a navigable water of the U.S. (TNW).

Tributary stream order, if known: 1st.

(b) General Tributary Characteristics (check all that apply):

Tributary is: ☒ Natural

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[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

☐ Artificial (man-made). Explain:

☐ Manipulated (man-altered). Explain:

Tributary properties with respect to top of bank (estimate):

Average width: **10 feet**

Average depth: **3 feet**

Average side slopes: **2:1.**

Primary tributary substrate composition (check all that apply):

☐ Silts	☒ Sands	☐ Concrete
☒ Cobbles	☒ Gravel	☐ Muck
☐ Bedrock	☒ Vegetation. Type/% cover: non-vegetated	
☐ Other. Explain:		

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: Natural erosion.

Presence of run/riffle/pool complexes. Explain: Flow in the channel was not

observed during the December 1, 2011 site visit. The District was not able to determine if riffle/pool complexes were present in the tributary.

Tributary geometry: **Meandering**

Tributary gradient (approximate average slope): 1 %

(c) Flow:

Tributary provides for: **Seasonal flow**

Estimate average number of flow events in review area/year: **Pick List**

Describe flow regime: The District has characterized the flow in the stream as seasonal based on the average annual snowfall, indicators of an ordinary high water mark and scour in the channel, indicators of groundwater discharge into the channel, and an analysis of the drainage area using the District's seasonal stream evaluation protocol. Average annual snowfall at the site is 46.7 inches. In normal years the majority of this snow melts and is drained from the landscape through surface tributaries eventually finding its way to the Red River of the North. In normal years, the snowpack in combination with precipitation results in continuous flow from mid-to late March through June. The frequency and duration of flow in the unnamed tributary is sufficient to create an ordinary high water mark. District staff observed a clear natural line impressed on the bank, shelving, and sedi-

ment sorting in the channel. During a site investigation on December 1, 2011 no surface flow in the channel was observed but pools were observed sporadically throughout its length. These observations were made in the midst of a severe drought in this portion of Minnesota. No precipitation was recorded during the three days leading up to the site investigation and the only precipitation recorded in the 14 days preceding the investigation was 0.04 inches on November 27th. Persistent pools in the channel under these conditions are an indication of groundwater contributions to flow in the channel. To further evaluate flow in the tributary the District utilized its seasonal stream evaluation protocol. The protocol is based on the results of monitoring conducted on hundreds of first and second order channels throughout Minnesota and Wisconsin. In general, the St. Paul District's observations have identified that tributaries that have drainage areas in excess of one square mile typically meet the agency's definition of seasonal flow (continuous flow for at least three months). The drainage area for the unnamed tributary was determined to be 2.4 square miles or almost 2.5 times the threshold identified during the District's assessment of flow duration on first and second order tributaries. Given this information the District has charaterized the flow in the tributary as seasonal with continuous flow between ice out and mid-June. Stream flow may be present at other time and may also persist longer in years with normal precipitation if

groundwater discharge is supplying flow to the tributary.

Other information on duration and volume: The owner of the property where the tributary is located has provided conflicting information regarding the duration of flow in the tributary. In an oral statement to Corps staff on December 1, 2011 he indicated that flow is present in the channel from ice out until mid June. In a written statement to Mr. Brian Ross of Widseth Smith Nolting he states that there is only flow in the tributary for 2.5 weeks and after large rain events. In light of these discrepancies the Corps has chosen not to rely on these statements for this JD.

Surface flow is: **Discrete and confined.** Characteristics:

Subsurface flow: **Unknown.** Explain findings: Pools in channel in December more than 48 hours after a precipitation event during drought conditions indicate groundwater discharge into the tributary.

☐ Dye (or other) test performed:

Tributary has (check all that apply):

☒ Bed and banks

☒ OHWM[6] (check all indicators that apply)

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[6] A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by

- ☒ clear, natural line impressed on the bank
- ☐ the presence of litter and debris
- ☒ changes in the character of soil
- ☐ destruction of terrestrial vegetation
- ☒ shelving
- ☐ the presence of wrack line
- ☐ vegetation matted down, bent, or absent
- ☒ sediment sorting
- ☒ leaf litter disturbed or washed away
- ☐ scour
- ☐ sediment deposition
- ☐ multiple observed or predicted flow events
- ☐ water staining
- ☒ abrupt change in plant community
- ☐ other (list):

☐ Discontinuous OHWM.[7] Explain:

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development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

[7] *Ibid.*

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

- ☐ High Tide Line indicated by:
  - ☐ oil or scum line along shore objects
  - ☐ fine shell or debris deposits (foreshore)
  - ☐ physical markings/characteristics
  - ☐ tidal gauges
  - ☐ other (list):
- ☐ Mean High Water Mark indicated by:
  - ☐ survey to available datum;
  - ☐ physical markings;
  - ☐ vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: There is no quantitiatve water data for the tributary. Based on general watershed characteristics (predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings) there should be no impairments in

the tributary. Further, the amount of impervious surface in the drainage area for the tributary is less than 10% which is under the recognized threshold above which adverse effects to water quality are seen as a result of urbanization.

Identify specific pollutants, if known: none known.

(iv) Biological Characteristics. Channel supports (check all that apply):

☒ Riparian corridor. Characteristics (type, average width): The tributary is buffered by a forested (deciduous) riparian corridor from its upstream origin downstream to the terminus at the Middle River. The riparian corridor increases in width moving from upstream to downstream along the tributary. The widths range from 5 feet (each side of the tributary) to approximately 300 feet (each side) near its confluence with the Middle River.

☐ Wetland fringe. Characteristics:

☐ Habitat for:

☐ Federally Listed species. Explain findings:

☐ Fish/spawn areas. Explain findings:

☐ Other environmentally-sensitive species. Explain findings:

☒ Aquatic/wildlife diversity. Explain findings: The tributary could serve as a movement corridor between the Middle River and the wetland and upland habitats adjacent to it. Amphibians, reptiles, and mammals all utilize stream channels as migration routes and various species of each are known to inhabit this portion of Minnesota.

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Wetland size: The wetlands in the review area total 145 acres

Wetland type. Explain: According to the National Wetland Inventory the wetlands in the review area consist of 133 acres of palustrine emergent/scrub shrub, broad-leaved deciduous, saturated, organic soil (PEM/SS1Bg) and 12 acres of Palustrine scrub shrub, broad- leaved deciduous, saturated, organic soil (PSS1B). The vegetative communities at the site were also mapped as part of the Minnesota Department of Natural Resources, Minnesota County Biological Survey (MCBS). The MCBS effort identified four wetland plant community types in the review area: rich fen, aspen forest, tamarack swamp, and willow swamp. In June 2011, Corps staff

completed a reconnaissance inspection of the wetlands in the review area to, among other things, conduct spot checks of the MCBS plant community type mapping. This investigation revealed that the rich fen is composed of the sedge subtype and the shrubby subtype, that the willow swamp was accurately mapped, and that the tamarack swamp mapped on the eastern portion of the site is really a hardwood swamp dominated by quaking aspen.

Wetland quality. Explain: The Mercil wetland complex (review area) is considered a Rich Fen (Minerotrophic) by the Minnesota Department of Natural Resources, with high vegetative biodiversity. During the June 2011 site inspection District staff noted observed that the wetlands within the review area had escaped significant alteration by activities such as grazing, cultivation and logging. As a result, the site appears to exist in a pre-European settlement condition and is correctly given an outstanding statewide biodiversity significance ranking by the MCBS. The exceptional quality of the wetlands in the review area is further enhanced by the high quality of the surrounding upland buffers and the unfragmented landscape of wetlands and uplands that represent one of the best examples of ridge and swale communities in Marshall County and northwestern Minnesota. A quantitative site-specific functional assessment has not been performed for the wetlands in the review area.

However, District staff who are familiar with application of the Minnesota Routine Assessment Methodology (MnRAM) for evaluating wetland functional assessment have qualitatively assessed the suite of functions addressed by MnRAM and concluded that given the reference standard quality of the site they would expect it to rate high or exceptional for the full suite of functions. These include: vegetative diversity/integrity, maintenance of characteristic hydrology, flood attenuation, downstream water quality, wetland water quality, characteristic wildlife habitat structure, and maintenance of characteristic amphibian habitat.

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: **Intermittent flow**. Explain: Surface flows from the wetlands in the review area move south from 120th Avenue into the MNDNR Wildlife Management area and then into the man made drainage feature that discharges into the unnamed tributary. Flow from the wetlands to the south underneath the road were observed during a site visit on June 1, 2011. Surface flows occur in response to snowmelt and precipitation with continuous discharges present between March and June and more intermittent discharges occurring after significant precipita-

tion events in other portions of the year. Peak discharges from the wetlands occur in the spring as a result of combined snowmelt and precipitation. This flow regime is best described as seasonal and intermittent.

Surface flow is: **Pick List**

Characteristics: At times during the year surface flow through the wetland can be described as overland sheet flow (March through June). Outside of this period, surface flows may be more confined to small channels that collect groundwater and precipitation and carry it south towards the unnamed tributary. The surface flow characteristics are best described as seasonal and intermittent.

Subsurface flow: **Unknown.** Explain findings: There has been no formal investigation of the subsurface flow from the wetlands. Evidence of groundwater discharge was observed in the tributary but the source of the groundwater or the contribution from the wetland has not been determined.

☐ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

☐ Directly abutting

☒ Not directly abutting

☒ Discrete wetland hydrologic connection. Explain: The review area creates an artificial boundary within a large continuous wetland that extends south towards the unnamed tributary and Middle River (see Figures 1 and 3). The wetland is also divided by 110th Ave NW but water flows freely between the road through 2-24 inch culverts (the culverts are located approximately 50 yards apart). Surface water was observed at similar elevations on both sides of the road during the June 2011 site visit. Along the southern edge of this wetland an east-west oriented drainage feature was excavated to intercept surface flows from the wetland and direct them to the east. This drainage feature was constructed in wetlands and is still considered to meet the wetland criteria in the Corps 87 manual and applicable regional supplement. This wetland drainage feature connects with a man-made drainage feature excavated through uplands that directs flows from the wetland to the southeast. This drainage feature did not have a continuous ordinary high water mark and, therefore, is not considered to be a tributary. The man-made drainage feature carries water approximately 512 feet to the southeast where it discharges into the unnamed tributary and ultimately the Middle and Red Rivers. Thus, the wetlands in the review area are part of a large wetland covering several hundred acres that is adjacent to the unnamed tributary via a discrete surface hydrologic connection.

☐ Ecological connection. Explain:

☐ Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are 30 (or more) river miles from TNW

Project waters are 30 (or more) aerial (straight) miles from TNW

Flow is from: **Wetland to navigable waters.**

Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: The chemical characteristics of the wetlands in the review area was not directly assessed and visual inspections of the water in the wetland provided no obvious indications of water quality impairments (surface water in the wetland appeared clear). However the wetland is categorized as a rich fen which indicates that pH levels are near neutral but nutrient poor. As dis-

cussed in the tributary section of this JD, the surrounding landscape is primarily undisturbed open space which typically results in good water quality.

Identify specific pollutants, if known: None known.

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

☐ Riparian buffer. Characteristics (type, average width):

☒ Vegetation type/percent cover. Explain: 90% rich fen consisting of a very diverse sedge dominated herbaceous litter and 10% aspen parkland consisting of quaking aspen, dogwood and a sedge dominated understory.

☐ Habitat for:

☐ Federally Listed species. Explain findings:

☐ Fish/spawn areas. Explain findings:

☐ Other environmentally-sensitive species. Explain findings:

☒ Aquatic/wildlife diversity. Explain findings: The wetlands in the review area are high quality and are used by amphibians, reptiles, mammals, and birds. The expansive size of the wet-

lands and its pre-European settlement condition make it a valuable resource in the agricultural dominated lanscape of western Minnesota.

3. **Characteristics of all wetlands adjacent to the tributary (if any)**

   All wetland(s) being considered in the cumulative analysis: **Pick List**

   Approximately (591) acres in total are being considered in the cumulative analysis.

   For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

   see discussion below

   Summarize overall biological, chemical and physical functions being performed: The District has determined, based on the National Wetland Inventory, that there are 591 acres of wetlands adjacent to the relevant reach, including those within the review area (see Figure 3). While this approach likely underestimates the area of wetlands, a wetland delineation of the wetlands adjacent to the tributary and outside of the review area is not practical for this determination. The 591 acres are one continuous wetland that extends from the nor-

thern boundary of the drainage area of the relevant reach south towards the unnamed tributary (the wetland does not abut the unnamed tributary). Within this one wetland the NWI identifies six separate wetland types:

Palustrine emergent/scrub shrub, broad-leaved deciduous, saturated, organic soil 328.4 acres

Palustrine scrub shrub, broad-leaved deciduous/ emergent, saturated, organic soil 168.3 acres

Palustrine scrub shrub, broad-leaved deciduous/ forested needle-leaved deciduous, saturated, organic soil 51.8 acres

Palustrine scrub shrub, broad-leaved deciduous, saturated 3.5 acres

Palustrine scrub shrub, broad-leaved deciduous, saturated, organic soil 38.7 acres

Palustrine unconsolidated bottom, intermittently exposed, excavated 0.4 acre

As discussed in the preceding section of the JD (addressing wetlands in the review area), the entire drainage area and the wetlands within it that are adjacent to the unnamed tributary exist in a mostly undisturbed pre-European settlement condition. In light of this, District staff has qualitatively assessed the functions these wetlands provide and concluded that the wetlands outside of the review area would also

score exceptional or high for the suite of functions previously identified.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional

Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus be-

low, based on the tributary itself, then go to Section III.D:

2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: See attached document titled "Section III.C. Significant Nexus Determination"

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/ WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:

   ☐ TNWs: linear feet width (ft), Or, acres.

   ☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**

   ☐ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:

   ☐ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

   Provide estimates for jurisdictional waters in the review area (check all that apply):

   ☐ Tributary waters: linear feet width (ft).

   ☐ Other non-wetland waters: acres. Identify type(s) of waters:

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**

   ☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus

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[8] See Footnote # 3.

with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

☐ Tributary waters: linear feet width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.

☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

☐ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale

indicating that wetland is directly abutting an RPW:

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: 250 acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

☒ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: 155 acres.

7. **Impoundments of jurisdictional waters.**[9]

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

☐ Demonstrate that impoundment was created from "waters of the U.S.," or

☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or

☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]

☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.

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[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

[10] **Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.***

☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

☐ which are or could be used for industrial purposes by industries in interstate commerce.

☐ Interstate isolated waters. Explain:

☐ Other factors. Explain:

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

☐ Tributary waters: linear feet width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters:

☐ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.

☐ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.

☐ Prior to the Jan. 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).

☐ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:

☐ Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).

☐ Lakes/ponds: acres.

☐ Other non-wetland waters: acres. List type of aquatic resource:

☐ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).

☐ Lakes/ponds: acres.

☐ Other non-wetland waters: acres. List type of aquatic resource:

☐ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply--checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:

☐ Data sheets prepared/submitted by or on behalf of the applicant/consultant.

☐ Office concurs with data sheets/ delineation report.

☐ Office does not concur with data sheets/ delineation report.

☐ Data sheets prepared by the Corps:

☐ Corps navigable waters' study:

☒ U.S. Geological Survey Hydrologic Atlas:

☒ USGS NHD data.

☒ USGS 8 and 12 digit HUC maps.

☒ U.S. Geological Survey map(s). Cite scale & quad name: 1:24,000, Newfolden, Minnesota.

☒ USDA Natural Resources Conservation Service Soil Survey. Citation: Marshall County, Minnesota.

☒ National wetlands inventory map(s). Cite name: Newfolden, Minnesota.

☐ State/Local wetland inventory map(s):

☐ FEMA/FIRM maps:

☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)

☒ Photographs: ☒ Aerial (Name & Date): Lidar, 2011, FSA 2010.

or ☐ Other (Name & Date):

☐ Previous determination(s). File no. and date of response letter:

☐ Applicable/supporting case law:

☒ Applicable/supporting scientific literature: Mitch, W.J., Gosselink, J.G. (2000). Wetlands (Third ed.) New York: John Wilry & Sons Inc.

☒ Other information (please specify): Maps, JD determination, property owner statement and on-site photos submitted on behalf of the

applicant on December 19, 2011, by Widseth, Smith and Nolting.

B. ADDITIONAL COMMENTS TO SUPPORT JD: Conclusions regarding Section III B.2 were reached with field review on June 1 and December 1, of 2011. These conclusions are therefore based on those site visits, knowledge of local stream morphology, geologic characteristics, and GIS review. Land use surrounding the relevant reach is predominantly agricultural, peat mining, with a smaller amount of residential. The functions of the wetlands adjacent to the relevant reach combined with the functions provided by the tributary results in a significant nexus to the Red River, a TNW After reviewing and considering the data submitted by the applicant, the Corps rejects the applicant's position that the wetland review area is isolated. The Corps determination is that there is a significant nexus between the wetland review area and the Red River (TNW).

Section III.C. Significant Nexus Determination

Wetlands and streams are recognized as providing a number of important functions to downstream waters, both individually and cumulatively. These include maintenance of water quality, mitigation of storm and flood flows, maintenance of base flows, energy and nutrient export, pollutant and nutrient transformation and retention, and maintenance of wildlife habitat. The functions provided by the relevant reach and the

nexus to the Red River are discussed in the following paragraphs.

Summary of Functions Provided by Wetlands in the Relevant Reach

The wetlands adjacent to the relevant reach of the tributary total approximately 590 acres. The wetlands are comprised of rich fen, aspen forest, willow swamp, and hardwood swamp vegetative communities. From a hydrogeomorphic classification perspective the wetlands are classified primarily as organic flats which are characterized as having a water regime dominated by precipitation while water loss is typically by overland flow and seepage to groundwater. Organic flats are also distinctive in that their elevation and topography are controlled by the vertical accretion of organic matter. Within the review area, Corps staff has confirmed that surface water flows from/through the wetland are generally to the south towards the Middle River. The surface elevations in the wetlands vary between 1,141 ft in the north to 1,134 ft in the south. The outlet of the wetlands is a man made surface ditch that carries flows to an unnamed tributary of the Middle River. The wetlands in the relevant reach have been assessed to function at a high level for all the functions considered[1], however, a few are called out

[1] Based on the high quality plant communities present and the undisturbed condition of the wetlands and adjacent uplands.

for the significance of their relationship to the Red River.

Flood and Stormwater Storage/Attenuation. The wetlands adjacent to the relevant reach of the tributary provide an important flood storage function. During a site investigation in June, 2011 Corps staff noted between 6 and 20 inches of standing water at various locations within and outside of the wetlands in the review area. This surface water was being slowly released south into the unnamed tributary to the Middle River. The amount of surface water in the wetland decreased throughout the growing season, an indication that the wetland stores water early in the spring and summer. The timing of the storage function provided by the wetlands parallels the stream flow of the unnamed tributary such that the storage of melting snow and precipitation is attenuated in the wetlands and then released through the unnamed tributary from mid-march through june in normal years. To estimate the potential surface water storage capacity of the wetlands in the relevant reach, the Corps utilized surface elevation data to conduct a coarse scale GIS based analysis. The analysis estimated that the wetland is able to provide over 200 acre-feet of storage.[2] This estimate does not consider the effects of vegetation, evapotranspiration, or the storage capacity of soils at the site. This potential

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[2] A more detailed description of the methods for determining wetland storage is available in the administrative record.

storage is particularly important following spring runoff and following storm events when wetlands help to elongate the period during which water is released downstream thereby reducing the peak of the hydrograph in the Red River. This has an overall effect of reducing downstream flooding by holding water in these upper portions of the watershed.

Biogeochemcial Processes The wetlands in the relevant reach transform and store pollutants and nutrients, which is important for downstream water quality. The wetlands at the site are receiving chemical inputs from adjacent uplands, precipitation, and atmospheric deposition. The transformation of these inputs is the primary source of nutrients and organic carbon into the riverine system. The nitrogen, phosphorus, and carbon cycling that occur in these wetlands, coupled with the surface flows and groundwater discharge to the tributary system is important to the productivity and health of the downstream receiving waters. These benefits are not limited to the intermediate waters between the relevant reach and the TNW but also to the Red River itself. As described in the chapter on Northern Peatlands in Mitsch and Gosselink's *Wetlands*, peatlands with surface outflows export nutrients, organic carbon, and energy. These wetlands also serve as considerable sinks of nutrients and in situations where the peat is eroded from the source have the potential to release much more significant quantities of nitrogen, phosphorus, and mercury. Since the vast majority of stream miles and wetlands

in the watershed are located in and along headwater streams, the biogeochemical processing functions they provide are essential to maintaining water quality and aquatic habitat and, if present, eliminating identified impairments. For the relevant reach, the functions performed by these wetlands is more important given that there are over five hundred acres of wetlands present performing these functions.

Summary of Functions Provided by the Tributary in the Relevant Reach

The relevant reach of the tributary is an unnamed first order stream that flows to the Middle River. The flow regime of the tributary is intermittent[3] The tributary originates approximately 1,800 feet southeast of the review area. It flows approximately 1,500 feet southeast before merging with another first order stream and entering the Middle River. The drainage area is approximately 2.4 square-miles. The drainage area is relatively unaltered and consists predominantly of open space with smaller areas of agriculture, residential dwellings, and roads.

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[3] The Corps has not quantitatively assessed the flow regime of the tributary but, based on the size of the drainage area, observed flow through the wetlands in June, and direct observations of groundwater supported pools in the stream channel, has made a determination that the stream has an intermittent flow regime and would also be considered a seasonal stream per agency guidance.

The physical and hydrologic functions of headwater streams are associated with the transfer of mass, momentum, energy, and organisms. The streams essentially function as conduits with the rate of transfer influenced by the flow characteristics of the stream including magnitude (discharge), frequency, duration, timing (seasonality of different flow regimes), and the rate of change (transition time between flows of given magnitudes). The District has characterized the flow in the tributary as intermittent with continuous flow occurring from mid-March through June in normal years. Based on the approximate channel dimensions recorded during the December 2011 site investigations and a maximum water depth in the channel of two feet, the unnamed tributary has an estimated channel cross sectional area of 5.5 square feet. Assuming an a range of average velocities between 0.1 and 1.5 feet/second for flows in the channel between March and June during the spring, the discharge to the Middle River would range from 0.55–8.25 cubic feet/second. Outside of the continuous flows in the spring, additional flow events occur in response to precipitation events and in the fall when precipitation exceeds evapotranspiration prior to winter freeze and snowfall. In northern Minnesota, discharge and velocity for this type of channel would typically be highest in the spring (March and April) in response to snowmelt and precipitation. Stream flow steadily declines through late April and May and may dissipate completely by

sometime in June or July when evapotranspiration rates are highest.

In addition to the water in the channel, the tributary also transports energy, materials, and nutrients downstream. Indicators of this transport function were observed by the Corps during the December 2011 site inspection when leaves and woody debris were observed along the length of the stream. These materials are either broken down in the stream by decomposers in the channel to provide energy and nutrients for other biota or are carried further downstream where they are either broken down or provide structure that increases channel roughness and improves habitat. The transport of sediment, a pollutant of concern in the Middle and Snake Rivers, was not quantified for this determination. It was obvious that some material is being transported downstream from the observations of natural bank erosion in the tributary and the sorting of sediments in the channel. District staff did not observe any areas along the tributary during the 12/1/2011 field visit where the stream bank appears to be failing or eroding in excess of what normally would be observed on a stable first order stream. These contributions are viewed as components of a natural process and are not considered excessive or problematic in terms of a contribution to a documented turbidity impairment in the Red River. In contrast, by not contributing more than an expected amount of sediment, the tributary is performing a valuable function by maintain a stable condition and pre-

venting additional loading downstream. Therefore, the relevant reach is not expected to be a significant source of sediment to downstream receiving waters, a characteristic which is a benefit to the Middle, Snake, and Red Rivers.

There is no water quality data for the unnamed tributary. However, general inferences about potential pollutants can be made by evaluating the general characteristics within the drainage area of the relevant reach. The contributing area to the tributary is predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings. In general, areas with limited impervious surfaces and agricultural use have better water quality and are less likely to have water quality impairments. As a result, the discharges from the relevant reach would be viewed as having a beneficial effect on the downstream TNW.

Headwater streams play an important role in nutrient transformations. Although the majority of these studies have focused on perennial headwater streams, the tributary in the relevant reach would be expected to provide these functions to some degree when downstream discharges are occurring. Headwater streams constitute up to 85% of total stream length within a drainage network, directly connect the upland and riparian landscape to the rest of the stream's ecosystem, and collect most of the water and dissolved nutrients from adjacent terrestrial ecosystems. Due to

their large surface-to-volume ratios, small streams play an important role in regulating water chemistry. Despite their relatively small dimensions, they play a disproportionately large role in the uptake and transformation of inorganic nitrogen (Peterson et al. 2001). Headwater streams are also home to organisms that break down organic matter and release inorganic carbon and other nutrients that are utilized to support food webs further downstream. Decreased levels of inorganic carbon and other nutrients, limit plant growth further downstream, which in turn directly impact food availability for primary herbivores and those organisms that feed upon them. Indicators of this function being performed by the stream were observed during investigations on 12/1/2011. District staff observed woody debris in various forms of decomposition and also noted the presence of leaf litter and other organic material in the channel bottom. The presence of these materials confirms that the tributary is serving a transport function for organic matter to downstream waters.

Institutional Recognition of the Functions Provided by the Tributary and its Adjacent Wetlands

The functions provided by the wetlands at the site must also be considered in a broader regional (Red River Valley) and watershed (Red River Basin) context. The Red River of the North is unique, as Thomas Waters describes in his book "*The Streams and Rivers of Minnesota*", the valley associated with

the Red River of the North is not formed by the river as valleys are typically formed, but in this case, the valley is actually a glacial lake basin. The Red River "merely collects the drainage of an extinct lake bed and remains a meandering stream that is small relative to its vast watershed" (Waters 1977).

Lake Agassiz, the shallow glacial lake that covered much of northwestern Minnesota, northeastern North Dakota, and southern Manitoba left a unique geologic setting within the Upper Great Plains that still strongly influences hydrology, stream geomorphology, and aquatic biota today (Emmons and Oliver 2009). The Valley has three distinct regions: the lakeplain, the Agassiz beach ridges and interbeach area, and the glacial moraine (RRBFDRWG 2001). Prior to settlement, the area was a vast complex of tall grass prairie, interspersed with wet meadows, marshes, fens and peatlands; and edged by oak and aspen woods. Headwater streams rose in the moraines, cut through the beach ridges and flowed to the Red River.

Because the Basin's lakeplain is one of the largest level tracts of land in the world, with excellent soils and mild summers, early settlers recognized its tremendous agricultural potential. Today, the lakeplain is almost entirely converted to farmland. As in many other agricultural areas, the primary natural resource concerns in the Valley are soil erosion, increased runoff and sedimentation, poor water quality, degradation of aquatic habitat and the loss of wildlife habitat and

biological diversity. The primary economic concerns include frequent flooding that results in flood damages to agricultural crops, infrastructure and communities.

In Marshall County, less than 20% of pre-settlement wetlands remain, a fact recognized by State and Federal regulatory agencies that regulate impacts to the remaining wetlands (Anderson and Craig 1984). Impacts of flooding within the basin and the loss of habitat and biodiversity have been discussed for decades. Vast amounts of studies, monitoring data, and models have been collected and developed for the Red River Valley. The agencies have recognized that the cumulative loss of wetlands has had a detrimental effect on the integrity of the aquatic systems in the watershed and that the functions provided by those that remain are important to the downstream receiving waters including the Red River. Efforts in the past decade have focused on addressing the problems from a watershed perspective and recognizing that integrating flood damage reduction and natural resource protection and restoration efforts should occur at the basin level.

Characteristics of the Red River of the North and Linkages to Functions Performed in the Relevant Reach

The Red River is subject to frequent flood events. During the 10-year period between 2001 and 2010, the yearly peak streamflow at the USGS gage maintained in Drayton, North Dakota (located approximately 24

river miles downstream where the Snake River flows into the Red River) reached minor flood stage in 3 years, moderate flood stage in 2 years, and major flood stage in 3 years. Because the Red River valley is relatively flat, flood events often cover large areas of land. Flood damage reduction (FDR) projects have been undertaken or are planned by local, state, and federal agencies in numerous communities affected by Red River flooding.

In 1998, the Red River Water Management Board (RRWMB), the Red River Basin Flood Damage Working Group, and others forged an agreement to establish a collaborative approach to solving issues in the basin (RRBFDRWG 1998). An initial flood damage reduction framework was developed that began to model and identify the contribution of each watershed in the basin to flooding on the mainstem Red River. One of the primary strategies developed was and continues to be storing water in the upstream areas of a watershed through both natural and constructed wetlands. The fundamental premise is that flood damage reduction along the main stem of the Red River and the lower reaches of its major tributaries is substantially dependent on the types and locations of FDR and related measures implemented upstream, fundamentally mimicking the pre-settlement ecosystem that existed in the valley.

Recently, the framework was reaffirmed after the completion of additional modeling and further allocat-

ed reduction goals to each watershed based on their contributions to the peak flows on the Red River (RRBC 2011). The Middle-Snake-Tamarac Rivers Watershed District (Watershed District) identifies a goal of a 20% reduction in peak flow from the Middle River watershed in its Final Ten Year Watershed Management Plan (MSTRWD 2011). This plan includes creating and restoring approximately 380 acres of wetlands in the Middle River watershed to achieve the 20% reduction goal.

The Red River is listed as impaired for aquatic life and aquatic consumption (MPCA, 2010). The pollutants/stressors for these impairments are mercury and PCB in fish tissue and turbidity. The Middle River is listed as impaired for dissolved oxygen and turbidity. The relevant reach of the tributary and its adjacent wetlands are likely not a contributing source of the listed impairments for the Red River or Middle River because they are currently in a primarily undisturbed condition and the functions they are performing are preventing rather than contributing to water quality impairments.

The Red River is recognized as an important fishery. Common game fish species in the river include channel catfish, northern pike, smallmouth bass, sauger, and walleyes. The network of streams in the Red River watershed are critical to different phases of a fish's life cycle, with the tributaries used for spawning and rearing young and on the main stem for refuges during

harsh weather. The Red River is also the historical habitat of the lake sturgeon (*Acipenser fulvescens*), a species of special concern in Minnesota. As a result of over exploitation, construction of dams, and declines in water quality by the mid-1900s, the species had largely been extirpated in the Red River. The Minnesota Department of Natural Resources (MNDNR) is working with several Federal and state agencies, as well as the Canadian Government, to return a viable population of lake sturgeon to the Red River. Improving water quality and restoring and or maintaining spawning habitat in the tributaries to the Red River, including the Middle River, are noted as important components of the MNDNR's long range plan.

For terrestrial wildlife species, the important habitat areas remaining in the basin are floodplain forests and all areas of native vegetation, particularly those containing high quality complexes or clusters of different plant communities. The wetlands adjacent to the relevant reach of the tributary are located in the Agassiz Beach Ridge and interbeach area. The beach ridges provide important staging areas for migrating sandhill cranes, waterfowl, and shorebirds. This area contains clusters of biologically rich areas, containing many of Minnesota's rare species (RRBFDRWG 2001). The wetlands adjacent to the relevant reach of the tributary are identified as a high quality wetland community in the county biological survey (MCBS) completed by the state and identified in the Minnesota Biological Survey (MBS) as sites of high and outstanding biolog-

ical significance. The Middle-Snake-Tamarac River Watershed District identifies these wetlands as important resources that should be protected and conserved. (MSTRWD 2011).

Significant Nexus Determination

The combined functions of the tributary and its adjacent wetlands have a significant nexus on the Red River of the North based on the following:

- The wetlands adjacent to the tributary provide an important water storage function. The wetlands are located in the upper portion of the watershed and within the areas identified as being important for storing water to reduce peak flows on the Red River. Modeling has shown that relationships between tributaries and the main Red River in this part of the basin are easiest to understand and activities that decrease the peak flow from these areas will decrease peak flows on the main Red River (Anderson and Kean 2004). The District calculated a storage potential of 200-acre feet for the wetlands in the review area. The maximum storage of the wetlands is realized primarily between March and June each year when the risk of flooding on the Red River of the North is greatest. This is also the time of year that the tributary has continuous flow thus linking the functions of the wetlands and the tributary to the Red River of the North during a critical time of the year. The importance of this

storage function is recognized by the Middle-Snake-Tamarac Rivers Watershed District (Watershed District) who is responsible for protecting and maintaining the health of these watersheds including the reduction and/or prevention of flooding. One of the components of the Watershed District's management plan is to create and restore approximately 380 acres of wetlands in the Middle River watershed to assist in meeting their goal of a 20% reduction in peak flow from the watershed.

- The tributary provides a source of nutrients and energy (organic carbon) to the Red River of the North. The importance of the contributions of headwater streams and their adjacent wetlands is well documented in the scientific literature. The District analysis has demonstrated that the wetlands and the tributary are performing the functions that provide these essential inputs. The tributary also provides nutrient transformation functions by breaking down and transporting organic matter (leaf litter and woody debris) into forms more readily available to biota in downstream receiving waters. Further, the tributary serves as a conduit for the export of these materials from the relevant reach. The flow regime of the channel provides these materials during the period of peak discharge between March and June each year and in response to more significant precipitation events outside

of this time period. These contributions from the relevant reach to the Middle River and eventually the Red River are important for maintaining and improving habitat for the fisheries in the Red River of the North including the lake sturgeon. Improving the quality of the habitat in the Middle River and the Red River of the North is heavily reliant on the quality of the inputs into these rivers. The District's assessment of the relevant reach is that it is having a beneficial effect on the downstream receiving waters.

- The high quality condition of the relevant reach is preventing excess loading of sediment to the Middle River and the Red River of the North. Both of these rivers are listed as impaired for turbidity by the MPCA. The wetlands in the relevant reach are trapping and holding sediment and preventing further transport downstream. Further, District staff inspected the tributary channel and did not observe any significant erosion or bank failures. The flood storage provided by the wetlands helps to moderate discharge in the tributary which prevents erosion. Thus, the condition of the relevant reach is protecting downstream water quality by preventing stream bank failures, excessive erosion, and transport of these materials downstream.

- The organic flat wetlands in the relevant reach are a potential source of mercury and nutrient loading to the Red River of the North. In their current condition, the wetlands in the relevant reach are a sink for nutrients and mercury because the accumulating organic material acts as a nutrient sink. Studies have shown that when the organic material (peat) is eroded, disturbed, or otherwise transported downstream there is a high potential to release nutrients and mercury into discharge waters and degrade downstream water quality. During the periods of high surface flow in the spring, the discharges from the wetlands would carry nutrients and mercury through the unnamed tributary to the Middle River and eventually into the Red River of the North. The potential for the release of mercury from organic flat wetlands is recognized by the State of Minnesota and discharges from commercial peat mining operations are often monitored for mercury and sometimes must be treated before leaving a site. The retention function provided by the wetlands is thus preventing the release of mercury from the organic material and preventing additional mercury loading to the Red River of the North.

Based on these considerations, a significant nexus exists between relevant reach (comprised of the tributary and its adjacent wetlands) and the Red River of the North, a traditionally navigable water.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.: 13-3067

HAWKES CO., INC., ET AL.

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
APPELLEE

AMERICAN FARM BUREAU FEDERATION, ET AL.,
AMICI ON BEHALF OF APPELLANT(S)

July 7, 2015

ORDER

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(0:13-cv-00107-ADM)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 07, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ MICHAEL E. GANS
MICHAEL E. GANS

APPENDIX E

1. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

2. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

3. 33 U.S.C. 1319 provides in pertinent part:

Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public

notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph

(1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint

source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsec-

tion may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,,[1] or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to

---

[1] So in original.

comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the

violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil pen-

alty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public

notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or

Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order

not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified

copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

* * * * *

4. 33 U.S.C. 1344(a) provides:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

5. 33 C.F.R. 320.1(a) provides in pertinent part:

Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.*

* * * * *

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

* * * * *

6. 33 C.F.R. 331.2 provides in pertinent part:

Definitions.

The terms and definitions contained in 33 CFR parts 320 through 330 are applicable to this part. In addition, the following terms are defined for the purposes of this part:

* * * * *

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

* * * * *

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include deter-

minations that a particular activity requires a DA permit.

* * * * *

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

* * * * *

No. 15-290

In The

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC. ET AL.

Respondents.

On Petition For A Writ of Certiorari To
The United States Court Of Appeals
For the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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October 6, 2015

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER, UNITED STATES ARMY CORPS OF ENGINEERS

Amicus curiae National Association of Home Builders ("NAHB") respectfully moves for leave of the Court to file the accompanying brief under Supreme Court Rules 21, 33.1, 37.2. Counsel for both parties received timely notice of *amicus curiae's* intent to file the brief. The Solicitor General has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for Hawkes Co. takes no position.

NAHB has been involved with litigation concerning whether Clean Water Act jurisdictional determinations are reviewable under the Administrative Procedures Act. In addition, as a representative of land developers, NAHB brings considerate expertise to the issue before the Court.

A large part of building homes consists of obtaining and preparing the land for construction.[1] That land often contains "waters of the United States," as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often land developers must alter those "waters" to ensure that their community makes the best use of

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1 NAHB estimates that the cost of the "finished" lot averages 19 percent of the sales price of a home. Heather Taylor, *Cost of Constructing A Homes*, Special Studies (Jan. 2, 2014), http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=221388&channelID=311 (last visited Sept. 30, 2015)

the land in accordance with local and state zoning and land use requirements.

Unfortunately, property owners cannot simply look at their property to determine where "waters of the United States" are present. They must hire consultants — engineers, scientists, and regulatory and compliance specialists, who assist the developers with the permitting process. Those specialists will often develop a "jurisdictional determination" and submit it to the Corps of Engineers for approval. It is common for the developer's consultants and the Corps to disagree on the Corps' jurisdiction. The amount of jurisdiction the Corps asserts over a project will affect whether and how the development proceeds, and sometimes results in a community not being built.

In its Petition for Review, the government cited an Endangered Species Act case, *National Ass'n of Home Builders v. Norton*, 415 F.3d 8 (D.C. Cir. 2005), to support its belief that approved jurisdictional determinations are not reviewable under the Administrative Procedure Act. In the attached brief, *amicus curiae* provides the Court with an analysis of a different NAHB case that is more analogous to this matter: *National Ass'n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005).

In addition, NAHB provides an example of situation where the government conducted a jurisdictional determination on its own accord for the purpose of later asserting jurisdiction over thousands of square miles of land. Incredibly, even in that situation, the

government argued that the determination was not a "final agency action" under the APA.

Given the nationwide importance of the issue presented to our members, NAHB agrees with the government that the issue presented in this case is worthy of this Court's review. However, NAHB believes that approved jurisdictional determinations should be subject to judicial review. Therefore, *amicus curie* respectfully requests that the Court grant leave to file this brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they constitute 80% of all homes constructed in the United States.

As presented in the attached motion, the cost of land development can affect whether a homebuilder can develop a viable community. Furthermore, the presence of "waters of the United States" on a homebuilders' property affect the cost preparing the land. Thus, NAHB's members believe it is vital for them to be able to challenge the government's jurisdiction over their private property in a court of law without first incurring tens (or hundreds) of thousands of dollars in costs and experiencing substantial project delay in order to contest jurisdiction.

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NAHB, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In its Petition for Review, the government cites an Endangered Species Act case, *National Ass'n of Home Builders v. Norton,* 415 F.3d 8 (D.C. Cir. 2005), to support its argument that approved jurisdictional determinations are not reviewable under the Administrative Procedure Act. Amicus curiae summarizes a different NAHB case that is analogous to the matter before the Court and supports the argument that jurisdictional determinations are judicially reviewable. *National Ass'n of Home Builders v. United States Army Corps of Engineers,* 417 F.3d 1272 (D.C. Cir. 2005).

Additionally, NAHB provides an example of situation where the government conducted a jurisdictional determination on its own accord for the purpose of later asserting jurisdiction over thousands of square miles of land. Incredibly, even in that situation, the government argued that the determination was not a "final agency action" under the APA.

ARGUMENT

I. JURISDICTIONAL DETERMINATIONS IMPACT LAND DEVELOPERS' DAY-TO-DAY BUSINESS.

When the government provides a landowner with an "approved jurisdictional determination," it informs the landowner where "waters of the United States" are present and where they are not. *See* 33 C.F.R. §§ 328.3(a), 331.2 (defining "waters of the United States and "approved jurisdictional determination"). With respect to Clean Water Act ("CWA") section 404, 33 U.S.C. § 1344(a), that landowner may place dredged or fill material on those portions of her property that do not contain "waters of the United States" free from federal governmental interference. Often, land developers will avoid the "waters of the United States" completely and only work in the "upland" areas. They do so because the time and expense of obtaining a section 404 permit can drastically alter the expenses of a project.[2]

The government cites *National Ass'n of Home Builders v. Norton*, 415 F.3d 8 (D.C. Cir. 2005) to support its contention that approved jurisdictional determinations are not "final agency action" under the judicial review section of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Pet. for Writ

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2 "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).

of Cert. at 16. That case involved a challenge to a survey protocol – a guidance document intended to assist landowners in avoiding "take" of a rare butterfly. A more analogous case to the case before the court, however, is *National Ass'n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005) (hereinafter *NAHB v. Corps*). In that case, the D.C. Circuit held that the APA allows judicial review of a Corps' CWA program that affects the manner in which private landowners may use their property.

In *NAHB v. Corps*, NAHB challenged a suite of Corps' issued general permits known as nationwide permits ("NWPs"). NWPs "authorize certain discharges of dredged and fill material into [waters of the United States] without any detailed, project-specific review by the Corps' engineers." *NAHB v. Corps*, 417 F.3d 1279-80. When a landowner who needs to discharge dredge or fill material cannot utilize one of the Corps' NWPs, she must obtain an individual permit before discharging pollutants into waters of the United States. *Id.* at 1275.

The District Court held that the NWPs were not final agency action. It reasoned that the NWP's were just "the first step of a larger permitting process that enables the agency to streamline the overall process " *National Ass'n of Home Builders v. United States Army Corps of Engineers*, 297 F.Supp.2d 74, 80 (D.D.C. 2003). The Court of Appeals disagreed. It explained that the impact of the NWPs on a builder's' "day-to-day business" was not hard to understand.

> While some builders can discharge immediately, others cannot. If [a builder's] planned activities do not meet the applicable NWP's conditions and thresholds, they have two options. They can either put their projects on hold and run the Corps' individual-permit gauntlet or modify the projects to meet the conditions. Either way, through increased delay or project modification, the NWPs directly affect investment and project development choices of those whose activities are subject to the CWA.

NAHB v. Corps, 417 F.3d at 1280.

The impacts of jurisdictional determinations on builders are very similar to the impacts of the NWPs. A builder who has obtained an approved jurisdictional determination providing that no "waters of the United States" are present on her property can place dredge or fill material on the property free from federal governmental interference.[3]

In contrast, if a Corps' jurisdictional determination provides that "waters of the United States" are present, and the landowner needs to place dredge or fill material in those areas, she can "either put [her] project on hold" and try to obtain a costly (and time consuming) CWA permit, or modify her project to

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3 There are, of course, other federal statutes that may affect land use (i.e. the Endangered Species Act), but they are not relevant to this example.

avoid the jurisdictional waters. Either way, jurisdictional determinations, like NWPs, "affect investment and project development choices" and are therefore "final agency actions." *Id.; See also Bennett v. Spear*, 520 U.S. 154, 169 (1997) (providing that while a biological opinion in theory serves an "'advisory function,' in reality it has a powerful coercive effect ").

NAHB v. Corps illustrates how Corps' decisions that occur before issuance (or denial) of a permit impact the manner in which landowners may use their property Therefore, NAHB respectfully request the Court grant certiorari and affirm the Eighth Circuit's holding that CWA jurisdictional determinations are reviewable under the APA.

II. JURISDICTIONAL DETERMINATIONS CAN PROVIDE THE GOVERNMENT WITH AUTHORITY TO CONTROL THOUSANDS OF ACRES OF PRIVATE PROPERTY.

In its Pet. for Writ of Cert., the government explains, "because jurisdictional determinations (unlike EPA compliance orders) are typically provided to persons who request them, they are not easily used "to enable the strong-arming of regulated parties." Pet. for Writ of Cert. at 19. While it is true that the government generally conducts jurisdictional determinations for those who request them, that is not always the case. When the government conducts a jurisdictional determination on its own, it is later able to assert control over large areas of land, which can affect thousands of private property owners. Yet, even in such situations, the government will

argue that it has not altered any rights or obligations, or that no legal consequences flow from such a determination. When this occurs, without any protections for the regulated public, the "strong arming" the Court was concerned with in *Sackett v. United States Environmental Protection Agency,* 566 U.S. ---, 132 S.Ct. 1367 (2012), is still in existence. The government's jurisdictional determination that two reaches of the Santa Cruz River in Arizona are "traditionally navigable waters" provides a perfect example of such a situation. [4]

In May 2008, Colonel Magness, U.S. Army Corps of Engineers, issued a determination that two reaches of the Santa Cruz River are "traditionally navigable waters" (hereinafter the "TNW Determination"). App. 10a. The government characterized this as a Clean Water Act jurisdictional determination.

The Santa Cruz River, from the 1800's to today is a discontinuous stream, normally flowing only in response to significant rainfall or discharges of effluent from regional wastewater treatment plants near Nogales and Tucson, in Southern Arizona. One of the two TNW reaches is only 22 miles long and the other is 32 miles long and begins at the discharge outlet of Pima County's Roger Road wastewater treatment plant in Tuscon, AZ. App. 10a-16a.

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4 The Corps TNW Determination became the subject of a Congressional investigation by the Committees on Oversight and Government Reform and on Transportation and Infrastructure. The Committees subpoenaed documents and, ultimately, issued a report on December 16, 2008. NAHB has provided some of the subpoenaed documents in its Appendix.

However, the Santa Cruz River watershed covers over 10% of Arizona, contains over 8,000 square miles, and includes the Tucson Metropolitan area – the second largest population center in Arizona.

The TNW Determination was "stand-alone," meaning it is not associated with a request from a property owner or permit application. *See* App. 4a; *see also* 33 C.F.R. §329.14. Instead, the Colonel made this determination because, in his words, "[w]e cannot determine jurisdiction [in the Santa Cruz River watershed] without first identifying the nearest downstream TNW" App. 6a. Recognizing the vital importance of TNWs to CWA jurisdiction following this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), Colonel Magness issued the stand-alone TNW Determination "to support some of the pending JDs" within the watershed. *Id.*

In June 2008, the Assistant Secretary of the Army for Civil Works suspended the TNW Determination pending a 60-day review by Corps' Headquarters. During the review period, Colonel Magness and his staff emphasized the importance of the Corps' TNW Determination for obtaining jurisdiction to regulate tributaries within the Santa Cruz River watershed. According to the Colonel, "without this TNW, the closest TNW may be the Colorado River, several hundred miles away. Using the [Colorado River] as a basis for JDs would likely mean that we would lose most of our jurisdiction in the state." App. 7a. Another Corps staff member explained that without the Corps' Stand Alone TNW Determination, the Corps would lose CWA jurisdiction over much of the Santa Cruz River watershed:

> If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries to the Santa Cruz River. While the Santa Cruz would still likely be an RPW, the nearest TNW to the 8,600 square mile Santa Cruz River Watershed Basin would be 300 river miles away (the Colorado River) from the Pima County line. An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area.

App. 9a. Thus, the Corps made the TNW Determination because without it, the Corps would lose control over thousands of acres of private property.

Corps Headquarters never completed its 60-day internal review of the TNW Determination. Instead, in August 2008, EPA Headquarters declared the Santa Cruz River a "special case" under the U.S EPA, Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act [hereinafter the MOU], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/404f.cfm. A special case is "a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404" of the CWA. *Id.* According to the MOU, "[c]ase-specific

determinations made pursuant to" it are "binding on the Government" – both EPA and the Corps – "and represent the Government's position in any subsequent Federal action or litigation regarding the case." *Id.*

The EPA concluded its review on December 3, 2008, affirming the Corps TNW Determination. App. 1a. In affirming the TNW Determination, the EPA described the regulatory and practical implications for landowners within the Santa Cruz River watershed:

> I have asked EPA Region 9 to begin immediately to implement this decision and request that you also transmit this determination to the Los Angeles District so it may be used by the Corps to complete pending and future jurisdictional determinations for the Santa Cruz River watershed.

App. 2a (emphasis added).

Thus, the government made an immediately binding determination that two reaches of the Santa Cruz River were "traditionally navigable waters." A decision it made i) so it could assert control over desert washes and other "tributaries" within 8,600 square-miles and ii) that would impact the rights of thousands of private land owners. Yet, neither those people who own land that contains tributaries of the Santa Cruz River, or those who own land bordering the Santa Cruz itself were notified of the determination.[5] In

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5 Pursuant to the Corps regulations, landowners have a right to an administrative appeal of approved jurisdictional

other words, all of this occurred "behind closed doors."

NAHB and its affiliates in Arizona disagreed with the analysis used to support the TNW Determination and with the process the government used to finalize it. With respect to the process, NAHB believed that a binding determination that affects millions of acres and thousands of private landowners must be accomplished in accordance with the notice and comment procedures set forth in the APA. 5 U.S.C. § 553. Therefore, NAHB filed its initial lawsuit challenging the EPA's and Corps' Santa Cruz TNW determination in 2009.

Without answering NAHB's Complaint, the government filed a motion to dismiss. Among its arguments, the government asserted the TNW Determination is not a "final agency action" under the APA. 5 U.S.C. § 704. Specifically, the government explained that the TNW Determination was not a "final agency action" until used in an enforcement action or incorporated into a permit decision.[6] Therefore, according to the government when it makes a "binding" decision asserting authority over millions of acres of land, affecting thousands of private citizens in a major metropolitan area, none of those citizens

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determinations. 33 C.F.R. § 331.1(a). The regulations also explain that the Corps will notify affected parties of their right to appeal. 33 C.F.R. § 331.4.

6 Under the line of cases overturned by *Sackett*, 566 U.S. ---, 132 S.Ct. 1367 (2012), the District Court ruled that the Clean Water Act precluded review of the TNW Determination. *National Ass'n of Home Builders v. U.S. E.P.A.*, 731 F. Supp. 2d 50, 56 (D.D.C. 2010), *aff'd on other grounds, sub nom. National Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6 (D.C. Cir. 2011).

can seek judicial review of that decision until one of them applies for and completes the Corps' costly and time consuming permitting process. Furthermore, depending on the type of permit sought, the landowner may have to complete an administrative appeal before obtaining judicial review *See NAHB v. Corps*, 417 F.3d at 1275.

Amicus provides this example of a stand-alone jurisdiction determination to illustrate how the issue in the case before the Court may affect thousands of people without them evening knowing it. Amicus requests that the Court grant certiorari in this matter and explain to the government that when it asserts jurisdiction over private property, those landowners have a right to contest such assertion in court.

CONCLUSION

Whether a landowner may obtain judicial review of a CWA approved jurisdictional determination is of vital importance to the home building industry. Therefore, NAHB respectfully requests that the Court grant certiorari in this matter and affirm the decision of the Court of Appeals for the Eighth Circuit.

DATED: October 6, 2015

Respectfully submitted,

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APPENDIX E – Memorandum from Colonel Thomas H. Magness, U.S. Army Commander for the Record (May 23, 2008) 10a

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON DC 20460

DEC 3 2008

OFFICE OF WATER

The Honorable John Paul Woodley, Jr.
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington DC 20310

Dear Secretary Woodley:

In August 2008, I designated the Santa Cruz and Los Angeles Rivers as special case pursuant to the 1989 Army/EPA *Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA*. EPA continues to evaluate relevant information and to coordinate with the Los Angeles District and others on this matter.

* * *

EPA's determination to affirm the District's designation of the two reaches as TNW's is based on several key considerations, including:

- Evidence that the physical characteristics with the Study Reaches indicate a susceptibility for use in the future for

commercial navigation, including commercial water-borne reaction. For example, river-width, when combined with flow data from relevant flow gauges, shows sufficient levels of flow in the Study Reaches to support navigation.

- Evidence that the Study Reaches, or portions thereof, have been navigated.
- Evidence of the likelihood of future commercial navigation use, including two ongoing Corps of Engineers river restoration feasibility studies.
- Visual inspection by EPA during site visits to Study Reaches.

* * *

I have asked EPA Region 9 to begin immediately to implement this decision and request that you also to transmit this determination to the Los Angeles District so it may be used by the Corps to complete pending and future jurisdictional determinations for the Santa Cruz River watershed.

In consultation with the Los Angeles District, EPA is proceeding with its geographic jurisdictional analysis of the remainder of the Santa Cruz and the Los Angeles River and will make decisions for both when our review is complete. I appreciate the Corps assistance in this important evaluation. Please feel free to call me or have your staff contact my Chief of Staff, Greg Peck, with any questions regarding this matter.

/s/ Grumbles
Benjamin H. Grumbles
Assistant Administrator

cc: Wayne Nastri, Regional Administrator, EPA Region 9

Stephen A. Owens, Director, ADEQ

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SEP 24 2008

MEMORANDUM FOR DIRECTOR OF CIVIL WORKS

SUBJECT: Traditional Navigable Water Determinations Under the Clean Water Act

Effective immediately, the determination that a specific water body is a "traditional navigable water" (TNW) will be made by the Division Commander. Such TNW determinations will be based on a formal report of findings prepared by the District Engineer, accompanied by a legal opinion of the District counsel, and forwarded to the Division Commander for final decision. Every formal report of findings will be based substantially on applicable portions of the format described in paragraph (c) of 33 C.F.R. §329.14.

This directive applies to stand-alone TNW determinations for watercourses where the District Engineer proposes an upstream and downstream limit of navigability. This directive does not apply to TNW determinations associated with approved jurisdictional determination(s) or authorizations for the discharge of dredged or fill material into all waters of the United States, including wetlands. The purpose of this directive is to require additional technical review and oversight of TNW

determinations affecting watercourses and/or significant aquatic resources. This review will establish whether or not the TNW determination is supported by the Clean Water Act, the agency's implementing regulations, relevant case law, and existing guidance.

This directive shall remain in effect until rescinded in writing.

/s/ John Paul Woodley, Jr.
John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)

------Original Message------

From: Magness, Thomas H COL SPL
Sent: Monday, June 30, 2008 4:53 PM
To: Stockton, Steven L HQ02
Cc: McMahon, John R BG SPD; Lang, Lawrence A HQ02; Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Hannon, James R MVD
Subject: Re: Santa_Cruz_River_TNW_ Determination (UNCLASSIFIED)

Sir

Here are a few points on this:

-- We have a backing of nearly 400 JDs in the LA District. We are getting crushed under the weight of these post-Rapanos decisions. We cannot determine jurisdiction without first identifying the nearest downstream TNW This decision in Arizona was to determine the nearest TNW to support some of the pending JDs. We made these TNW calls on the Gila River and are now moving forward to look at associated JDs while similarly moving out on examinations of other rivers.

-- While Juridsiction [sic] is a complicated measure of chemical, biological, and physical impacts, the TNW determination is mostly a function of water quantity. In other words, does the water body have sufficient flow to support navigation? I am confident that we had the evidence and data to support this case.

-- On the Gila River, we identified two reaches with sufficient flow to support navigation. We deployed scientists to verify, looked at recent and historical flow data, and collected photographic evidence to verify these conditions.

-- In making this decision, we have stayed in contact with HQ Regulatory folks and with other districts making similar decisions, especially here in the West. The flow in these reaches is sufficient year-round to support our navigability decision. While it is mostly, but not exclusively. effluent from a wastewater treatment plant, we believe that case law does allow for this source in decisions of navigability

-- While not a factor in this decision, without this TNW, the closest TNW may be the Colorado River, several hundred miles away. Using the CR as a basis for JDs would likely mean that we would lose most of our jurisdiction in the state. I do not believe this was the intent of the Rapanos decision, even under the most conservative interpretations.

As you know sir, we are pinched on both ends on this. In California, we are taking heat from environmental groups who did not think we made enough of the LA River as a TNW In Arizona, we are hearing from developers who don't agree with what we have called TNWs.

Santa Cruz River TNW Data

------Original Message------
From: Smith, Chip R Mr ASA (CW) <email redacted>
To: Blaine, Marjorie E SPL
Cc: Troxel, Tiffany A SPL; Lester, Cynthia J SPL; Castanon, David J SPL; Young, Anne M Ms OGC <email redacted>; Moyer, Jennifer A HQ02; McLaughlin, Kimberly S HQ02
Sent: Fri Jun 13 08:30:01 2008
Subject: Re: ASA Inquiry on the Santa Cruz River TNW Determination

Good stuff. How long is the river and what is the length of the two sections. If these reaches are NOT TNWs what is the effect on the landscape in terms of jurisdiction over tribs and wetlands?

Chip

* * *

From: Cohen, Mark D SPL <email redacted>
Sent: Friday, June 13, 2008 5:55 PM
To: Smith, Chip R Mr ASA (CW)
Cc: Castanon, David J SPL; Blaine, Marjorie E SPL; Lester, Cynthia J SPL
Subject: Re: ASA Inquiry on the Santa Cruz River TNW Determination

Chip,

In response to your questions this morning:

The river is approximately 225 miles long. Reach A is 22 miles and reach B is 32 miles in length.

If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries to the Santa Cruz River. While the Santa Cruz would still likely be an RPW, the nearest TNW to the 8,600 square mile Santa Cruz River Watershed Basin would be 300 river miles away (the Colorado River) from the Pima County line. An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area. Tributaries to the Santa Cruz include many perennial and intermittent streams, with wetlands and other high value resources (including Sabino Canyon, Davison Canyon, and Cienega Creek).

Let me know if you need anything else.

Thanks,

Mark

CESPL-RG-A 23 May 2008

MEMORANDUM FOR THE RECORD

SUBJECT: Determination of Two Reaches of the Santa Cruz River as Traditional Navigable Waters (TNW)

Summary

The Corps' Los Angeles District has determined that two reaches of the Santa Cruz River, Study Reach A from Tubac gage station (USGS # 09481740) to the Continental gage station (USGS #09482000) and Study Reach B from Roger Road wastewater treatment plant (WWTP) downstream to the Pima/Pinal County line, Arizona, as shown in Exhibit A, are TNWs (collectively, referred to as the "Study Reaches"). This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R.§ 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance) and *Appendix D* of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued June 5, 2007 (Appendix D).

Background

The Santa Cruz River originates in Arizona, flows south into Mexico, and then flows north again into Arizona. It is the primary river which flows from Nogales, Mexico through Tucson, Arizona, and a number of Indian reservations, including Tohono O'odham Nation (TON), to the Gila River near Phoenix. The watershed of the Santa Cruz River is approximately 8,600 square miles. Until the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river's subsurface flow (Exhibit B).

The Upper Santa Cruz River Valley, located between Nogales, Arizona on the US-Mexico border, and extending 65 miles north to the major urban area of Tucson, has a long history of European settlement spanning three centuries. Prior to the discovery of the area by European explorers, the area was inhabited for thousands of years by aboriginal native peoples. The Santa Cruz River has long been an important corridor for trade and exploration. The river and its well established riparian habitat have served as a vital commodity for people and wildlife in the region.[1]

In addition to the use of the Study Reaches by recreational watercraft described in case-specific

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1 *The Santa Cruz River: A Resource Shared by Two Cities* by Hugh Holub, paper presented to the Border XXI EPA Regional Water Sub Work Group Meeting on March 6, 2001, Nogales, Sonora.

analysis below, in the mid 1850s, William Rowlett and his brother, Alfred, constructed an earthen dam on the Santa Cruz River south of the present-day Silverlake Road. They also installed a water-powered flour mill at this location in 1857/58. In 1860, William Grant purchased the flour mill and the dam/lake and improved the dam and mill in order to supply military posts in the southwestern region. He built a second, larger mill on the river and purchased the machinery in California. However, the mill was burned in 1861 to keep it from falling into Confederate hands. The mill was purchased by James Lee and returned to operations in 1864. In 1884, the mill, dam, and lake were sold to Frederick Maish and Thomas Driscoll who developed the Silver Lake Resort. In 1883, Solomon Warner built a second dam and mill on the river. The lake was approximately 60 acres, 8 feet deep, and the Arizona Citizen reported the use of a flat-bottom boat on the lake. Waterfowl populated the lake and hunting organizations claimed exclusive rights to shooting the waterfowl. The dams at both Silver Lake and Warner's Lake were breached by floods in 1886 and 1887; the Arizona Star reported on July 13, 1887 that the river was wide and deep enough to float a "mammoth steamboat." In 1888, Frank and Warren Allison purchased Warner Lake, repaired the dam, and stocked the lake with carp for commercial fish production selling over 500 pounds of fish per day.

Both dams were washed out by 1890.[2]

Further, in the summer of 1951, Glenton G. Syke, Tucson city engineer, navigated the Santa Cruz River in a 14-foot-long boat from the San Xavier del Bac Mission to Congress Street in Tucson.[3]

The Study Reaches were selected based on personal knowledge of the river by Regulatory staff, evidence of perennial flows based on stream gage data, and more readily available evidence of navigability.

Basis for TNW Determination

The Rapanos Guidance indicates that in its context, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 C.F.R. § 328.3(a)(1), (i.e., "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

As stated in Appendix D: "when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a Corps District has

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2 History of Navigation of the Santa Cruz River by Don Bufkin, citation unknown.

3 Admiral of the Santa Cruz by Glenton G. Sykes, The Journal of Arizona History, Vol. 20, Number 4, Winter, 1979.

determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 320.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. Part 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts."

To determine whether the Study Reaches are a TNW, in accordance to 33 C.F.R. § 328.3(a)(1), a case-specific analysis to evaluate whether the Study Reaches are navigable-in-fact, including consideration of its potential susceptibility to interstate and foreign commerce, was undertaken. The Corps has determined that the Study Reaches are a TNW based on the following factors:

1. The physical characteristics of the Santa Cruz River within the Study Reaches indicate that they have the capacity and susceptibility to be navigated by recreational watercraft.

A. Study Reach A is approximately 22 miles in length. The river near Tubac is typically more confined in ordinary flows to a channel approximately 15-20 feet wide with an approximate 1.5 mile wide, densely vegetated floodplain. Downstream of Amado, the floodplain increases in width to approximately 2.5 miles; the river channel is less confined, less vegetated, and more braided. Exhibit C shows monthly and daily flows for the Tubac, Amado, and Continental gage stations, as well as peak flows for the Amado and Continental gage stations (Tubac information unavailable). The

monthly gage data indicate perennial flow at Tubac since 1996, flow most months at the Amado gage station since 2003 (prior years unavailable), and intermittent flows at the Contintental gage station.[4] Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flow rates again typically increase during December and January. The gage data indicate the highest daily mean value at the Tubac gage station over the last 11-12 years was 637 cubic feet per second (cfs) during October and the lowest daily mean value at the same station during the same period was 4.5 cfs during June. The highest daily mean values typically occur from July-October.[5] The range of mean monthly flows (6.9 to 78 cfs) and the average daily flow in a representative year of 35 cfs indicate perennial flow at the Tubac gage station. The mean monthly discharge information at the Amado gage station is only available since October, 2003; the mean monthly discharge at this station in the last four years varied from .97 cfs to 67 cfs while the daily mean flow chart at the Amado gage station indicates perennial flow. The mean monthly discharge at the Continental gage station since 1940 varies from 43 cfs to 76 cfs while the mean daily values since 1939

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4 http://nwis.waterdata.usgs.gov/az/nwis/monthly

5 http://nwis.waterdata.usgs.gov/az/nwis/dvstat

shows flow daily with the exception of mid to late May through mid-June. This is expected since the river begins subsurface flow at this point, which defines the downstream end of this Study Reach.

B. Study Reach B is approximately 32 miles in length. The width of the riverbed varies from approximately 280 feet at the Roger Road WWTP to approximately 670 feet at Cortaro and approximately 575 feet at Trico Road while the active (ordinary flow) river channel at all three locations varies from 40-60 feet; at one location within this Study Reach, the river diverges into two similarly-sized channels. The river in Study Reach B is often confined at its maximum width by steep banks with soil cement or other bank stabilization in several locations. In other locations, for example at Ina Road, the river has lower, easily accessible, vegetated banks. Some areas are more densely vegetated than others. Exhibit C shows monthly, daily, and peak flows for gage stations at Cortaro and Trico Road (just upstream of the Pima/Pinal County line). Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flows again typically increase during December and January. The highest average daily mean value at the Cortaro gage station over the last 57-60 years was 703 cfs, also in October, and the lowest average daily mean value at the same station over the same period was 22 cfs during June. The average monthly discharge ranges from 23 to 124 cfs and the average daily flow in a representative year of 75 cfs indicate perennial flow at the Cortaro gage station. At the Trico Road gage station, since 1997,

the average monthly discharge ranged from 3.5 cfs to 710 cfs and daily mean values since 1989 ranged from 11 cfs to 863 cfs. The gage data document perennial flow at the Cortaro and Trico Road gages every month since 1996 with the exception of October, 1996.[6]

C. The peak flow charts demonstrate the frequency of flows which exceed 1,000 cfs.[7] Peak flow data is unavailable at the Tubac gage station; however, the maximum peak flow at the Amado gage station since 2004 was approximately 7,800 cfs and peak flow has approached or exceeded 2,000 cfs annually. The maximum peak flow at the Continental gage station was approximately 45,000 cfs in the early 1980s and the minimum peak flow has exceeded 1,000 cfs 63 times since 1940. The maximum peak flow at the Cortaro gage station exceeded 60,000 cfs in the early 1980s and has exceeded 1,000 cfs on an annual basis from 1940-1988 with the exception of once in the 1940s and once in the 1950s; the peak flow at the Cortaro gage station has also exceeded 1,000 cfs on an annual basis since approximately 1995. The maximum peak flow at the Trico gage station exceeded 25,000 cfs in 2007 and the minimum peak flow has been at or exceeded 1,000 cfs most years since 1989. The figures at the end of Exhibit C indicate the "real time" stages for late March-early April, 2008, at the

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6 Ibid

7 http://nwis.waterdata.usgs.gov/az/nwis/peak

Tubac, Cortaro, and Trico Road gage stations indicating flows in the river on a daily basis.[8] All three stations indicated flows with depths varying from 1-2 feet and no precipitation had occurred for approximately 6 weeks.[9] Additional real-time stage data obtained for late May is also provided for Tubac, Green Valley (near Continental), Cortaro, and Trico Road and indicates 1-2 feet of water currently in the channel at all the above locations. Extremely light precipitation occurred one day during this timeframe; however, the amount of precipitation received would not have been sufficient to cause surface flows[10]. A list of the large magnitude peak flow events of the Santa Cruz River over the last 100 years is provided at Exhibit D.[11]

D. While there is a variation in minimum flow required for canoeing, studies indicate the 95% confidence interval on the predicted minimum canoeing flow of 86 cfs for flatwater is 63 to 118 cfs.[12] Approximately two-three feet of water depth is sufficient to float a canoe, kayak, or small boat.

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8 National Weather Service Advanced Hydrologic Prediction Service: http://www/nws.noaa.gov/oh/ahps/

9 Personal observation, Marjorie Blaine, Senior Project Manager, Regulatory Division, Tucson Project Office

10 Ibid

11 http://www.wrh.noaa.gov/twc/hydro/floodhis.php

Based on the above information, during most days from July-October and again for approximately half the months of December and January. there is sufficient flow in the Santa Cruz River within the Study Reaches to float a canoe (based on the average daily mean value). Typically a kayak would be able to navigate in lower flows and less water than canoes.

E. Based on aerial photographs attached at Exhibit E, the Santa Cruz River from Tubac gage station to just upstream of Continental gage station and Roger Road WWTP to the Pima/Pinal County line has uninterrupted flow.

F The Arizona Department of Environmental Quality has adopted water quality standards for the Santa Cruz River for partial body contact.[13] Partial body contact allows for use of the surface water where the body comes into contact with the water but does not become fully submerged. Allowable uses under partial body contact would include but are not limited to boating and wading.

2. The Study Reaches within the Santa Cruz River have public accessibility.

A. The river has low banks in the vicinity of Tubac which allows for easy public access; these

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12 Riparian Areas of the Southwestern United States: Hydrology, Ecology, and Management by Malchus B. Baker and Peter F. Ffolliott, CRC Press, 2004

13 Personal communication with Steve Pawlowski, Arizona Department of Environmental quality, Unit Manager, Water Quality Standards and Assessments, April 24, 2008.

areas are currently frequented by riders on horseback. Resorts along the river provide access for out-of-state visitors for birding and hiking along the river.

B. Two Corps of Engineers feasibility studies for river restoration, El Rio Medio and Tres Rios del Norte, are in process. El Rio Medio will begin at Congress Street and progress downstream to Prince Road; Tres Rios del Norte will begin at Prince Road and progress downstream to Sanders Road in Marana. These projects will provide public trails along the river. Although the final design for these two projects has not been completed, it is likely river access will be provided. The two projects are shown in Exhibit F

C. There is currently public access to the river at several bridges, including but not limited to the Ina Road bridge where there are pull-out areas, the Cortaro Road bridge (including a parking lot), and at the Sanders Road bridge in Marana. All of these bridges have easy access to Interstate 10.

D. The historic 1200-mile Juan Bautista de Anza National Historic Trail runs from Nogales, Arizona to San Francisco, California. This trail parallels and overlaps the Santa Cruz River in the Study Reaches. The river can be accessed at several points along this trail in the Study Reaches by auto or also on foot (Exhibit F).

3. The Study Reaches of the Santa Cruz River have been used for interstate commerce and have the potential to be used for commercial activities involving navigation and interstate commerce in the future.

A. Navigation has occurred historically and recent times within the Study Reaches of the Santa Cruz River.

(1) On August 23, 2005, as part of a promotion, a local radio show host navigated the Santa Cruz River in a raft for an unspecified distance starting at El Camino del Cerro (within Study Reach B) (Exhibit G).

(2) In October, 1994, two members of the Friends of the Santa Cruz navigated a 17-foot-long canoe from a point south of Tubac three miles to a point north of Tubac (Exhibit G).

B. The Santa Cruz River is an international and interstate water. Several areas along the river provide access for birding by out-of-state visitors and resorts bordering the river, such as the Tubac Golf Resort, host out-of-state visitors who partake in local recreation including hiking, horseback riding, and birding along the river. The Tucson Audubon Society's North Simpson Farm is an area where prolific riparian habitat restoration projects have been focused and it is well-known for its opportunities for birding. This type of "ecotourism" provides a significant water resource-oriented opportunity in the desert. The Study Reaches and other areas within the region receive many interstate and foreign tourists seeking to expand their "bird list"; the Sonoran Desert, particularly in riparian areas such as the Santa Cruz River, provides a significant opportunity to see species endemic to this area.

C. Use of the river within the Study Reaches by recreational watercraft provides evidence of the susceptibility for commercial use.

Determination

Public access points within of the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow, indicate that the Study Reaches have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing. Such attractions and activities demonstrate that the Study Reaches may be susceptible to use in interstate commerce. Collectively, the above discussed factors demonstrate that the Study Reaches are navigable-in-fact, and thus a TNW, susceptible to use in interstate commerce associated with recreational navigation activities. Therefore, I hereby determine that the Study Reaches are subject to the jurisdiction of Section 404 of the CWA, pursuant to 33 C.F.R. § 328.3(a)(1).

This determination does not 1) consider any other potentially applicable bases for determining CWA jurisdiction within the Study Reaches or 2) foreclose analysis of other areas of the Santa Cruz River outside the Study Reaches for purposes of determining CWA jurisdiction.

05/23/08
Date

/s/ Thomas H. Magness
Thomas H. Magness
Colonel, US Army
District Commander

No. 15-290

In the

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONSE IN PART SUPPORTING THE PETITION AND SEEKING CONSOLIDATION WITH *KENT RECYCLING* (14-493)

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QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

LIST OF ALL PARTIES

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

CORPORATE DISCLOSURE STATEMENT

Hawkes Co., Inc., LPF Properties, LLC, and Pierce Investment Company have no parent company and no publicly held company owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 782 F.3d 994. The opinion of the district court (App. 22a-43a) is reported at 963 F. Supp. 2d 868.

JURISDICTION

The court of appeals entered judgment on April 10, 2015. The court of appeals denied the United States Army Corps of Engineers' (Corps) petition for rehearing on July 7, 2015 (App. 103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

The Administrative Procedure Act "creates a presumption favoring judicial review of administrative action." *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1373 (2012). That presumption applies in this case. Like the Sacketts, Hawkes is subject to agency strong-arming under the law. The facts show the wetlands on Hawkes' property are not jurisdictional under the Clean Water Act. But the Corps has erroneously determined otherwise through a final and legally binding Jurisdictional Determination (JD). Hawkes can take no action without incurring exorbitant expense and delay. Seeking a permit will cost hundreds of thousands of dollars and months or years in review. Proceeding with the project without a permit will subject Hawkes and its officers to both civil and criminal liability with potential fines of $37,500 per day and the risk of incarceration. Even taking no

action is prohibitive because it means an end to the proposed project and Hawkes' economic viability. Fairness requires, and the law demands, that Respondents be given "their day in court" to contest the Corps' illegal assumption of federal jurisdiction. Therefore, this Court should grant review of *Hawkes* to affirm the decision below.

ARGUMENT

I

THE COURT SHOULD GRANT REVIEW BECAUSE A THREE-WAY CIRCUIT SPLIT EXISTS ABOUT THE JUDICIAL REVIEWABILITY OF BINDING JURISDICTIONAL DETERMINATIONS

Respondents agree with the government that the Eighth Circuit decision in *Hawkes* created a conflict with the Fifth Circuit in *Kent Recycling Services, LLC* (a/k/a *Belle Company*) *v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), now pending in this Court (14-493). The *Hawkes* decision also conflicts with the decision of the Ninth Circuit in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008). This Court should, therefore, resolve the circuit split.

The Ninth and Fifth Circuits hold that a Jurisdictional Determination is conclusive as to federal jurisdiction, but not reviewable under the Administrative Procedure Act as final agency action. Those cases leave landowners with only three options: (1) abandon the proposed project, at great cost; (2) go through the pointless and costly permit process (averaging more than $270,000); or (3) proceed without a permit, risking immense fines of $37,500 a day and

imprisonment. *See* App. 14a-15a. These are not legitimate options. They are punitive sanctions imposed on landowners who challenge federal jurisdiction under the Clean Water Act. Accordingly, the Eighth Circuit properly held a Jurisdictional Determination was final agency action subject to judicial review because a Jurisdictional Determination is conclusive as to federal jurisdiction under *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and that Hawkes had no other adequate remedy in law. The court explained:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of [Hawkes] peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. For decades, the Corps has "deliberately left vague" the "definitions used to make jurisdictional determinations," leaving its District offices free to treat as waters of the United States "adjacent wetlands" that "are connected to the navigable water by flooding, on average, once every 100 years," or are simply "within 200 feet of a tributary." *Rapanos*, 547 U.S. at 727-28, 126 S. Ct. 2208, quoting a GAO report. The Court's decision in *Sackett* reflected concern that failing to permit

immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We

> conclude that an Approved JD is a final agency action and the issue is ripe for judicial review under the APA.

App. 15a-17a.

In her concurring opinion, Judge Kelly added this insight to the decision:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. *This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in Sackett. See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

App. 20a-21a (emphasis added).

The inter-circuit split occasioned by the *Hawkes* decision warrants review by this Court.

II

THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISIONS OF THE FIFTH AND NINTH CIRCUITS CONFLICT WITH THE DECISIONS OF THIS COURT

In addition to the conflict with this Court's unanimous decision in *Sackett*, on which the Eighth Circuit relied, the *Hawkes* court also documented a conflict between the decisions in *Fairbanks* and *Kent Recycling* with other decisions of this Court. In *Hawkes*, the court opined that the government grossly understated the impact of a Jurisdictional Determination by "exaggerating the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action." According to the Eighth Circuit, "[n]umerous Supreme Court precedents confirm that this is not a basis on which to determine whether 'rights or obligations have been determined' or 'that legal consequences will flow' from agency action." *Id.* Specifically,

> —[i]n *Bennett*, the Court held that a Fish and Wildlife Service biological opinion satisfied the second factor because it required the Bureau of Reclamation to comply with its conditions and thereby had "direct and appreciable legal consequences." 520 U.S. at 158, 178, 117 S. Ct. 1154. Though not self-executing, the biological opinion was mandatory. Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting

process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.

—In *Abbott Laboratories*, the Court held that prescription drug labeling regulations were a final agency action subject to pre-enforcement judicial review because they "purport to give an authoritative interpretation of a statutory provision" that puts drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing "misbranded" drugs. 387 U.S. at 152-53, 87 S. Ct. 1507

—In *Frozen Food Express v. United States*, 351 U.S. 40, 76 S. Ct. 569, 100 L. Ed. 910 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42, 76 S. Ct. 569. As in this case, the order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott Labs.*, 387 U.S. at 150, 87 S. Ct. 1507 The Court nonetheless held the order reviewable because the "determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact"; it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Frozen Food*

Express, 351 U.S. at 43-44, 76 S. Ct. 569. Here, the Revised JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston*, 400 U.S. at 70-71, 91 S. Ct. 203, the Court rejected as having "the hollow ring of another era" the contention that an "order lacked finality because it had no independent effect on anyone," citing *Frozen Food Express*.

—In *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942), the Court held that FCC regulations barring the licensing of stations that enter into network contracts, though not self-executing, were subject to immediate review. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose application for licenses the regulations will cause to be rejected." *Id.* at 422, 62 S. Ct. 1194. Here, the Revised JD alters and adversely affects appellants' right to use their property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA. Though the Revised JD is not-self-executing, "the APA provides for judicial review of all final agency actions, not

> just those that impose a self-executing sanction." *Sackett*, 132 S. Ct. at 1373.

App. 11a-13a.

These conflicts also warrant resolution by this Court.

III

THE COURT SHOULD GRANT REVIEW IN BOTH *HAWKES* AND *KENT RECYCLING* AND CONSOLIDATE THE CASES FOR BRIEFING AND ORAL ARGUMENT

The government argues *Hawkes* is the better case to resolve the inter-circuit split than *Kent Recycling* (14-493, now pending) because *Kent Recycling* "may" have standing problems. But this is a red herring. Both of these cases are before this Court on 12(b) motions to dismiss wherein the assertions made in the complaint are taken as facts. The government does not contest that the complaint in *Kent Recycling* is sufficient to establish standing, which is based on Kent Recycling's possession of an option to purchase which is still valid. Any other change in circumstance can be determined on remand, without harm to the court or the parties, where the issue of standing can be properly established. And the Court should take notice that many outside organizations and individuals, including, but not limited to, the American Farm Bureau Federation, U.S. Senator David Vitter, and the Center for Constitutional Jurisprudence, all supported Kent Recycling's Petition.

After this Court denied the petition for certiorari in *Kent Recycling*, the Eighth Circuit issued the decision in *Hawkes* creating the circuit split. Kent Recycling filed a petition for rehearing and this Court ordered the Solicitor General to respond. This Court has yet to rule on the rehearing petition. It should do so now by granting the petition and consolidating the case with *Hawkes*.

Both cases raise the same question: Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act? The court in *Hawkes* expressly rejected the Fifth Circuit decision in *Kent Recycling*. Moreover, the cases raise virtually identical facts. In both cases the parties administratively appealed their respective Jurisdictional Determinations on grounds that the district engineer failed to properly apply the law and provided insufficient facts to support the Corps' claim of jurisdiction. In both cases, the reviewing officer agreed with the appellants that the JD's were deficient and were remanded with orders to correct the deficiencies. But, in both cases, the district engineer reissued the deficient Jurisdictional Determinations as final without correction:

> In October 2012, the Corps' Deputy Commanding General for Civil and Emergency Operations sustained [Hawkes'] appeal, concluding after detailed analysis that the administrative record "does not support [the District's] determination that the subject property contains jurisdictional wetlands and waters," and remanding to the

> District "for reconsideration in light of this decision." On December 31, 2012, the Corps nonetheless issued a Revised JD concluding, without additional information, that there is a significant nexus between the property and the Red River of the North, and advising appellants that the Revised JD was a "final Corps permit decision in accordance with 33 C.F.R. § 331.10," which meant their administrative remedies were exhausted. *See* 33 C.F.R. § 331.12.

App. 7a-8a.

In effect, in both cases, the Corps knowingly issued an invalid JD. It would be a travesty therefore if either of the parties in these cases were denied the right to challenge these illegal agency actions in court.

The only significant difference between the two cases is that Kent Recycling raised a due process claim based on the issuance of the admittedly invalid Jurisdictional Determination. The Fifth Circuit held the constitutional claim is subject to the same finality requirements under the APA as a statutory challenge. That decision created another circuit split with the D.C. Circuit as well as the Ninth and Eighth Circuits. *See* Kent Recycling Petition for Certiorari at 26-28. That issue is just as important as the issue presented in *Hawkes* and constitutes an independent basis for review by this Court.

In as much as *Hawkes* and *Kent Recycling* constitute both sides of a primary circuit split, there could be a no more appropriate pairing. Moreover, *Hawkes* and *Kent Recycling* are represented by the same counsel. That being said, *Kent Recycling* is the

only one to raise the due process issue. That makes *Kent Recycling* indispensable to resolving that conflict.

Therefore, the cases should be consolidated for briefing and oral argument.

CONCLUSION

According to the government, the Corps issues "tens of thousands" of Jurisdictional Determinations each year. Government Petition at 21. And, the question presented in *Hawkes* is likely to recur because "the Eighth Circuit's decision in this case will likely encourage other regulated parties to seek immediate judicial review." *Id.* at 22. Review should therefore be granted to affirm the Eighth Circuit decision.

DATED: October, 2015.

Respectfully submitted,

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REPLY BRIEF

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals held in this case that a jurisdictional determination stating that particular property contains waters of the United States covered by the Clean Water Act, 33 U.S.C. 1251 *et seq.*, is reviewable "final agency action" under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* 5 U.S.C. 704. As the government explained in its petition for a writ of certiorari, that decision warrants review because it raises important questions about the proper timing of judicial review of the thousands of jurisdictional determinations that the United States Army Corps of Engineers (Corps) issues each year.

1. Respondents in this case agree (Br. 2) that certiorari should be granted. In particular, they agree (Br. 2-5) that the decision below conflicts with decisions of the Fifth and Ninth Circuits. See *Belle Co.* v. *United States Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), cert. denied *sub nom. Kent Recycling*

Servs., LLC v. *United States Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015); *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009). Respondents also agree that the issue is important (Br. 11) and "likely to recur" (Br. 12).

2. Respondents defend (Br. 1-9) the court of appeals' decision on the merits, arguing that a jurisdictional determination is subject to immediate judicial review because it forces a landowner to choose among incurring compliance costs, "abandon[ing] the proposed project," or "risking immense fines." Br. 2. The government disagrees for the reasons stated in its petition for a writ of certiorari, see Pet. 13-21, but will reserve further discussion for its briefs on the merits, should this Court grant plenary review.

3. Respondents further contend (Br. 9-12) that the Court should also grant the petition for rehearing in *Kent Recycling Services, LLC* v. *United States Army Corps of Engineers* (No. 14-493), and consolidate the two cases. That course of action is unwarranted. Like this case, *Kent Recycling* presents the question whether a jurisdictional determination is final agency action. But granting review and consolidating the cases would complicate, rather than facilitate, the Court's consideration of that question.

Respondents do not contend that granting review in *Kent Recycling* would materially aid the Court in resolving the "final agency action" question that is common to both cases. That question is a purely legal one that does not turn on the circumstances of any particular case. While respondents emphasize (Br. 11) that *Kent Recycling* and this case "constitute both

sides of a primary circuit split," this Court can take into account the Fifth Circuit's reasoning in *Belle* without granting certiorari in that case. Respondents do not dispute, moreover, that this case provides a fully adequate vehicle to consider the "final agency action" question.

Respondents contend (Br. 11) that the Court should grant review in *Kent Recycling* to consider the additional question whether Kent Recycling's claim that the Corps violated its due-process rights is subject to the APA's "final agency action" requirement. See 14-493 Pet. i. As the government explained in its *Kent Recycling* brief in opposition (14-493 Br. in Opp. 25-27), the Fifth Circuit's rejection of petitioner's due-process claim is correct and does not squarely conflict with any decision of another court of appeals. The denial of certiorari in *Kent Recycling* reflects the Court's evident determination that the second question presented did not warrant further review. With respect to that question, Kent Recycling has not established that any "intervening circumstances of a substantial or controlling effect" have arisen, or that any "other substantial grounds not previously presented" warrant rehearing on that question.* Sup. Ct.

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* In an October 16, 2015 letter to the Court, Kent Recycling argued that a recent Ninth Circuit decision conflicts with the Fifth Circuit's holding that Kent Recycling's due-process claim was properly dismissed because it did not challenge final agency action. That contention lacks merit. In *ASSE International, Inc.* v. *Kerry*, No. 14-56402, 2015 WL 5904715, at *1, *7-*9 (Oct. 9, 2015), the Ninth Circuit held that the State Department's decision to impose certain sanctions against a program participant did not fall within the APA's exception to judicial review for decisions "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The court stated in dicta that, even if the agency action in question had fallen

R. 44.2; see 14-493 Br. in Opp. to Pet. for Reh'g 4-5. Respondents likewise have provided (Br. 11) no justification for reconsidering the Court's denial of certiorari on the due-process issue.

The primary consequence of granting rehearing in *Kent Recycling* therefore would be to complicate the Court's consideration of the "final agency action" question by bringing before the Court the threshold justiciability issues present in *Kent Recycling*. As the government explained in its brief in opposition to the certiorari petition in *Kent Recycling*, the allegations in Kent Recycling's complaint do not establish that the terms of its alleged option to purchase the property at issue creates a concrete interest sufficient to support standing. 14-493 Br. in Opp. 8-12; see 14-493 Br. in Opp. to Pet. for Reh'g 5-8. It is also unclear whether the case continues to present a live controversy. 14-493 Br. in Opp. 11-12.

If this Court were to grant rehearing in *Kent Recycling* and consolidate the cases, the parties would brief and argue those justiciability issues, in addition to the "final agency action" question that is common to both cases, and the Court might ultimately conclude that *Kent Recycling* does not present a justiciable controversy. That conclusion would not prevent the Court from resolving the "final agency action" question in the context of *this* case. But because granting

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within Section 701(a)(2), "we would still be able to review [it] insofar as ASSE had raised colorable constitutional claims, unless Congress precluded such review." *ASSE Int'l*, 2015 WL 5904715, at *9 n.12. That statement does not address whether and how the APA's "final agency action" requirement applies to constitutional claims. The court had no occasion to consider that question, as it was undisputed that the State Department's decision constituted final agency action for APA purposes. *Id.* at *9.

the petition in *Kent Recycling* would not aid the Court in resolving that issue, considerations of judicial economy support granting review in this case alone.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant review in this case. The petition for rehearing in *Kent Recycling* (No. 14-493) should be held pending the resolution of this case, and then disposed of as appropriate in light of the Court's decision.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2015

Supreme Court, U.S.
FILED
JAN 22 2016
OFFICE OF THE CLERK

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 18, 2015
CERTIORARI GRANTED: DEC. 11, 2015

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 13-3067

HAWKES CO., INC.; PIERCE INVESTMENT COMPANY; LPF PROPERTIES, LLC, PLAINTIFFS-APPELLANTS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
9/19/13	Civil case docketed. [4077221] [13-3067](CYZ)
	* * * * *
12/11/14	**ARGUED & SUBMITTED in St. Paul** to Judges James B. Loken, Myron H. Bright, Jane Kelly on 12/11/2014 Mr. Reed Hopper for Appellants Hawkes Co., Inc., Pierce Investment Company and LPF Properties, LLC and Mr. Robert Lundman for Appellee United States Army Corps of Engineers. No Rebuttal. RECORDED [4224907] [13-3067] (CYZ)
4/10/15	OPINION FILED—THE COURT: James B. Loken, Myron H. Bright and Jane Kelly AUTHORING JUDGE: James B. Loken (PUBLISHED). CONCUR BY: Jane Kelly [4264064] [13-3067] (CMD)

DATE	PROCEEDINGS
4/10/15	**JUDGMENT FILED**—The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion.. JAMES B. LOKEN, MYRON H. BRIGHT and JANE KELLY Hrg Dec 2014 [4264084] [13-3067] (CMD)
	* * * * *
6/9/15	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellee United States Army Corps of Engineers w/service 06/09/2015 [4283652] [13-3067] (RL)
7/7/15	JUDGE ORDER: Denying [4283652-2] petition for enbanc rehearing filed by Appellee United States Army Corps of Engineers. The petition for panel rehearing is also denied. [4283652-3] PUBLISHED ORDER. Hrg Dec 2014 [4292636] [13-3067] (MER)
7/16/15	MANDATE ISSUED. [4295880] [13-3067] (MER)
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil Docket No. 0:13-cv-00107-ADM-TNL

HAWKES CO., INC. ET AL, PLAINTIFFS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/11/13	1	COMPLAINT *for Declaratory and Injunctive Relief* against Us Army Corps Of Eng. (Filing fee $ 350 receipt number 0864-3411674.) Filed by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. Filer requests summons issued. (Attachments: # 1 Exhibit(s) A-C, # 2 Civil Cover Sheet) (Merz, Gregory) (Entered: 01/11/2013)
		* * * * *
3/13/13	7	AMENDED COMPLAINT *for Declaratory and Injunctive Relief* against United States Army Corps of Engineers. Filed by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. No sum-

DATE	DOCKET NUMBER	PROCEEDINGS
		mons requested. (Attachments: # 1 Exhibits(s) A, B, C) (Merz, Gregory) (Entered: 03/13/2013)
		* * * * *
4/19/13	11	MOTION to Dismiss for Lack of Jurisdiction by United States Army Corps of Engineers. (Dertke, Daniel) (Entered: 04/19/2013)
4/19/13	12	MEMORANDUM in Support re 11 MOTION to Dismiss for Lack of Jurisdiction filed by United States Army Corps of Engineers. (Attachment: Certificate of Service). (Dertke, Daniel) Modified text on 4/19/2013 (lmb). (Entered: 04/19/2013)
		* * * * *
5/29/13	25	MEMORANDUM by Pacific Legal Foundation re 11 MOTION to Dismiss for Lack of Jurisdiction *Amicus Curiae Memorandum of Law in Support of Plaintiffs' Opposition to US Army Corps Motion to Dismiss* filed by Pacific Legal Foundation. (Attachments: # 1 LR7.1/LR72.2 Word Count Compliance Certificate) (Kaardal, Erick) (Entered: 05/29/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
5/31/13	26	MEMORANDUM in Opposition re 11 MOTION to Dismiss for Lack of Jurisdiction filed by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. (Attachments: # 1 LR7.1/LR72.2 Word Count Compliance Certificate) (Merz, Gregory) (Entered: 05/31/2013)
		* * * * *
6/21/13	28	Reply to Response to Motion re 11 MOTION to Dismiss for Lack of Jurisdiction filed by United Staets Army Corps of Engineers. (Attachments: # 1 LR7.1/LR72.2 Word Count Compliance Certificate) (Dertke, Daniel) (Entered: 06/21/2013)
		* * * * *
8/1/13	30	MEMORANDUM OPINION AND ORDER granting 11 Defendant's Motion to Dismiss for Lack of Jurisdiction (Written Opinion). Signed by Judge Ann D. Montgomery on 08/01/2013. (TLU) (Entered: 08/01/2013)
8/1/13	31	JUDGMENT (Attachments: # 1 Civil Notice—appeal) (jz) (Entered: 08/01/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
9/17/13	32	NOTICE OF APPEAL TO 8TH CIRCUIT by Hawkes Co., Inc., LPF Properties, LLC, Pierce Investment Company. Filing fee $ 455, receipt number 0864-3699153. (Hopper, M) (Entered: 09/17/2013)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Court File No. 13-107 (ADM/THL)

HAWKES CO., INC., PIERCE INVESTMENT COMPANY, AND LPF PROPERTIES, LLC, PLAINTIFFS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT

Filed: Mar. 13, 2013

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Hawkes Co., Inc., Pierce Investment Company, and LPF Properties, LLC, for their Amended Complaint seeking declaratory and injunctive relief allege as follows:

INTRODUCTION

1. In this action, the Plaintiffs seek review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, of a final agency action of the United States Army Corps of Engineers (the "Corps"), finding that certain property in which the Plaintiffs have an ownership or other beneficial interest (the "Property") is a water of the United States under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, known as the Clean Water Act ("CWA"), and therefore subject to the Corps' jurisdiction.

2. As a result of the Corps' unlawful assertion of jurisdiction, Plaintiffs are unable to use the Property without fear of a CWA enforcement action, fines, and penalties. The Corps' improper assertion of jurisdiction also subjects Plaintiffs to an unlawful and burdensome permitting requirement.

3. Plaintiffs seek by this action a declaration that the Property is not a water of the United States under the CWA. Plaintiffs also seek an injunction enjoining the Corps from exercising jurisdiction over Plaintiffs' Property.

4. The Court's review of the agency action that is the subject of this proceeding is based upon the administrative record before the Corps at the time the Corps made its decision.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary or proper relief"); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

6. The Property consists of approximately 530 acres of real estate located in New Maine Township, Marshall County, Minnesota. Venue in this judicial district is proper under 28 U.S.C. § 1931(e)(2) because the Property that is the subject of the action is located within this district.

PARTIES

7. Plaintiffs Pierce Investment Company ("Pierce Investment"), a Minnesota corporation with its principal place of business in Minnesota, and LPF Properties, LLC ("LPF Properties"), a North Dakota limited liability company with its principal place of business in North Dakota, each own portions of the Property.

8. Plaintiff Hawkes Co., Inc, ("Hawkes") is a North Dakota corporation with its principal place of business in North Dakota. Hawkes will pay royalties to the owners of the Property in consideration of its use of the Property to expand Hawkes' existing nearby peat mining operations to the Property.

9. All three plaintiffs are owned by the same four or five members of the Pierce family, and Kevin Pierce is an officer of all three plaintiffs and has been acting on their behalf in these proceedings.

10. Defendant United States Army Corps of Engineers is a branch of the Department of the Army and an agency of the United States.

LEGAL BACKGROUND

11. In 1972, Congress enacted the CWA to regulate "navigable waters."

12. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of dredged and fill material into "navigable waters."

13. Section 502(7) of the CWA, *id.* § 1362(7), defines "navigable waters" to mean the "waters of the United States, including the territorial seas."

14. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, through the Corps, to issue permits for the discharge of dredged and fill material into "navigable waters."

15. By regulation, the Corps may determine whether a particular parcel of property contains "waters of the United States" by issuing an Approved Jurisdictional Determination ("JD"). 33 C.F.R. §§ 320.1(a)(6), 331.2.

16. The Corps has promulgated regulations defining "waters of the United States." *Id.* § 328.

17. Under those regulations, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered "waters of the United States." *See id.* § 328.3.

18. In 2001, the United States Supreme Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), held that isolated, intrastate, non-navigable bodies of water are not "waters of the United States."

19. In response to the *SWANCC* opinion, the Corps, along with the United States Environmental Protection Agency ("EPA"), issued an Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," seeking comment on whether and how the agencies should amend the definition of the term in order to

account for the Supreme Court's decision. 68 Fed. Reg. 1991 (Jan. 15, 2003).

20. The Corps did not follow through with the rule-making.

21. Notwithstanding *SWANCC*, the Corps and EPA continued to interpret their authority under the CWA to extend to waterbodies and wetlands so long as these features had at least a "hydrological connection" to navigable-in-fact waterbodies. *See, e.g., United States v. Rapanos*, 376 F.3d 629, 638 (6th Cir. 2004), *vacated, remanded by Rapanos v. United States*, 547 U.S. 715 (2006).

22. In *Rapanos v. United States*, the Supreme Court rejected the agencies' hydrological connection theory of CWA jurisdiction. *See* 547 U.S. at 739 (plurality opinion); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

23. In that decision, Justice Scalia authored a plurality opinion, joined by three other Justices, which concluded that the Corps' jurisdiction over non-navigable waters only extends to "relatively permanent, standing or continuously flowing bodies of water" that are "connected to traditional interstate navigable waters." *Id.* at 739, 742 (plurality opinion). In addition, wetlands adjacent to such jurisdictional waters will qualify as jurisdictional when "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742.

24. Justice Kennedy concurred in the judgment but adopted a broader interpretation of the Corps' jurisdiction over non-navigable waters, finding them

jurisdictional if they "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). According to Justice Kennedy, a significant nexus exists where non-navigable waters, either alone or in combination with similarly situated waterbodies, "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters (also known as "traditional navigable waters"). *Id.* at 780. The Eighth Circuit Court of Appeals recognizes both the plurality opinion and Justice Kennedy's significant nexus test as supporting CWA jurisdiction over wetlands. *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).

25. After *Rapanos*, the Corps, in conjunction with EPA, issued a non-binding guidance document opining on the scope of the agencies' CWA jurisdiction. *See* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008). In that guidance document, the Corps and EPA assert their intention to exercise jurisdiction over "waters of the United States" that satisfy either the Scalia "relatively permanent" test or the Kennedy "significant nexus" test.

26. In April, 2011, the Corps and EPA issued a new draft guidance document, but it has not yet been finalized. *See* Draft Guidance on Identifying Waters Protected by the Clean Water Act (2011). In that guidance document, the Corps and EPA state their intention to continue to assert jurisdiction over "waters of the United States" that satisfy either the Scalia or the

Kennedy test. The document also notes the agencies' intention to engage in APA rulemaking after finalizing the new guidance.

FACTUAL ALLEGATIONS

The Property

27. The Property contains peat and, as such, is necessarily wetland. All peat mining occurs in wetlands because peat is only found in wetland environments. Thus peat mining is known as a "wetland dependent" activity and, in Minnesota, peat mining and wetland replacement and restoration associated with peat mining are regulated under permits issued by the Minnesota Department of Natural Resources.

28. The Plaintiffs' Property is located over 120 river miles from the nearest traditional navigable water ("TNW"), the Red River of the North.

29. There is no significant connection between Plaintiffs' Property and the Red River of the North located 120 river miles away. There is no significant chemical, physical or biological impact on, or connection between, the wetlands on Plaintiffs' Property and the Red River of the North.

30. There is no continuous surface connection between wetlands on Plaintiffs' Property and a water of the United States, such that it is difficult to determine where the water ends and the wetland begins. A farm, a separate, shallow ditch dug for farming purposes in an area the Corps concedes is upland at the border of the farm most distant from Plaintiffs' Property, and a sizable upland area are all located between Plaintiffs' Property and the area that the Corps claims

is a "relatively permanent water." In other words, the wetlands on Plaintiffs' Property are easily distinguishable from any jurisdictional water.

31. The wetlands on Plaintiffs' Property are not "waters of the United States" and in the two years that the Corps has had to establish that there is a significant nexus between the Red River of the North and Plaintiffs' Property, there is no information in the administrative record to support any such significant nexus.

Administrative Proceedings Before the Corps and Plaintiffs' Exhaustion of their Administrative Remedies

32. Hawkes is in the business of mining and processing peat. A portion of Hawkes' business involves the sale of peat meeting certain specifications to the golf course industry for use in construction of greens. In order to be suitable for the standards imposed by the industry the peat must meet certain quality standards.

33. The Property has substantial amounts of high quality peat that able to meet Hawkes's requirements for the next ten to fifteen years.

34. In October 2006, Pierce Investment obtained an option to purchase the Property, subject to receiving approval to conduct peat mining operations on the Property.

35. On March 20, 2007, Kevin Pierce, with Hawkes, met initially with representatives of the Corps and the Minnesota Department of Natural Resources ("MDNR"). The discussion at this meeting focused on potential roadblocks to the plan to mine peat on the

Property, including discussion of the Property's status as a rich fen and a wetland.

36. On January 15, 2008, Mr. Pierce again met with representatives of the Corps and the MDNR to review plans to conduct peat mining on the Property.

37. At this meeting, Mr. Pierce, on behalf of Hawkes, discussed with the Corps and MDNR representatives the high quality of the peat available at the Property and the importance to Hawkes' business of being able to mine peat on the Property. As Mr. Pierce explained, the peat then available to Hawkes provided approximately seven to ten years (as of January 2008) of future operations. Mr. Pierce also explained that, by expanding peat mining to the Property, Hawkes would extend the lifespan of its peat mining operation by ten to fifteen years.

38. On or about December 13, 2010, Hawkes applied for a permit from the Corps under Section 404 of the CWA to expand its existing peat mining operations to a portion of the Property.

39. As part of its permit application, Hawkes identified fifteen sites that it had evaluated as potential alternatives to the Property. None of those sites provided a viable alternative to peat mining on the Property.

40. In January 2011, Mr. Pierce again met with the Corps and MDNR representatives. At that meeting, Corps representatives spent the majority of time attempting to persuade Mr. Pierce to abandon his plans to mine peat on the Property. To that end, Corps representatives emphasized the cost associated with the permitting process, that there was no guarantee

that a permit would ever be granted, and that, even if a permit were to be granted, the process would take many years before it would be completed. Mr. Pierce advised that he had an option to purchase the Property and that he intended to proceed.

41. On or about March 15, 2011, the Corps issued a letter to Hawkes indicating the Corps had made a "preliminary determination that this wetland is a water of the United States and is regulated by the Corps under Section 404 of the Clean Water Act." ***See* Exhibit A.** The Corps' letter went on to assert that "at a minimum" an environmental assessment will be required.

42. Mr. Pierce again met with representatives of the Corps and the MDNR on April 23, 2011. At that meeting, one of the Corps representatives, Tamara Cameron, expressed the opinion that the Property would be completely and permanently destroyed if peat were to be mined on the Property. Ms. Cameron also stated that it could take years before a permit would be granted and that the process would be very costly.

43. On May 31 through June 3, 2011, representatives of the Corps conducted a site visit of the Property. At that time, a Hawkes employee told Steve Eggers, from the Corps, how important expanding operations to the Property was to Hawkes' ability to continue its business and how much he hoped that Hawkes would be able to begin mining on the Property soon. In response to these comments, Mr. Eggers suggested to the employee that he should start looking for another job, or words to that effect. Mr. Eggers has previously been the subject of complaints on one or

more occasions regarding his over-zealous actions on behalf of the Corps.

44. On or about August 25, 2011, the Corps sent another letter to Hawkes with a list of nine additional information items that would be needed in connection with the permit application. These included hydrological assessments of the wetland and of groundwater flow spatially and vertically, functional resource assessments including vegetation surveys, inventorying and analyzing the quality of wetlands in the entire watershed, evaluation of *upstream* potential impacts, and more. ***See* Exhibit B.** The cost of performing all of these requirements is anticipated to exceed One Hundred Thousand Dollars ($100,000.00).

45. Faced with these overly burdensome demands by the Corps and disagreeing with the Corps' preliminary determination of jurisdiction, Plaintiffs requested information on the basis for this determination.

46. On November 1, 2011, representatives of the Corps met with the then owner of the Property. Although Mr. Pierce had asked to be present in any meeting between the Corps and the landowner, the Corps chose to exclude him from this meeting. At the meeting, the Corps representatives emphasized to the landowner the harm that would result if peat mining were to be permitted on the Property and insisted that the landowner try to sell the Property to a wetlands bank or to another party. The Corps made these statements even though the Corps representatives were aware that Mr. Pierce had obtained an option to purchase the Property. The Corps also indicated that there is a very good possibility that an Environmental Impact Statement ("EIS") will be required by the

Corps for the permit application. An EIS will delay issuance of the permit for several years.

47. On November 8, 2011, the Corps provided Plaintiffs with a copy of a "draft" Jurisdictional Determination (the "draft JD") for the Property. The draft JD reflected a conclusion that the Property was connected by a Relatively Permanent Water ("RPW") —a series of culverts and unnamed streams which flowed into the Middle River—to a TNW (the Red River) and the Property was, therefore, subject to the Corps' jurisdiction under the CWA. The draft JD did not determine that there was a significant nexus between the Property and any navigable waters.

48. On December 1, 2011, Corps representatives conducted a site visit of the Property for the purpose of making a jurisdictional determination.

49. By correspondence dated December 19, 2011, Plaintiffs, through their wetland consultant, identified numerous errors in the draft JD and provided the Corps with additional information to be considered in connection with its jurisdictional determination. This information showed that there was, in fact, no RPW that connected the Property to a TNW

50. On or about February 7, 2012, Defendant issued an Approved Jurisdictional Determination (the "Initial JD"), concluding that there was a significant nexus between the Property and the Red River and accordingly, the Property was a "water of the United States" subject to the Corps' jurisdiction under the CWA.

51. On or about April 4, 2012, Plaintiffs filed a timely appeal of the JD under 33 C.F.R. § 331.6 setting

forth the reasons why the Property is not a water of the United States.

52. On or about April 23, 2012, the Regulatory Appeals Review Officer sent Plaintiffs' consultant a letter indicating that the appeal was appropriate for consideration by the administrative appeals program and the Corps then provided the administrative record to the Review Officer.

53. The parties presented their oral arguments before the Review Officer on July 24, 2012, and an Administrative Appeal Decision was issued on October 24, 2012, finding that the appeal had merit and that the administrative record "[did] not contain sufficient documentation/analysis to support a finding of Clean Water Act jurisdiction." ***See*** **Exhibit C.** In support of that conclusion, the Administrative Appeal Decision noted, among other things:

- "The [Administrative Record] does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date [sic] given to support the finding." (footnote omitted)
- "While the [Administrative Record] provides information indicating an OHW [i.e., "ordinary high water"] mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume,

duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW." (footnote omitted)

- "The [Administrative Record] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW. However, the water flow regime information was not sufficient to indicate that a significant nexus exists." (footnote omitted)

54. Following remand, on or about December 31, 2012, the Corps issued a revised JD (the "Revised JD") and advised that the Revised JD is a "final Corps permit decision in accordance with 33 C.F.R. § 331.10." According to 33 C.F.R. § 331.21, Plaintiffs are considered to have exhausted their administrative remedies when a final decision is made pursuant to 33 C.F.R. § 331.10.

55. The Revised JD does not contain any new information to support a significant nexus between the Property and the Red River of the North. However, the Revised JD still purportedly relies on Justice Kennedy's "significant nexus" test to assert jurisdiction over the Property, which is described by the Revised JD as a "Non-Relatively Permanent [Water] that flow[s] directly or indirectly into [a] Traditional Navigable [Water]."

56. The Revised JD does not add any new information that would demonstrate how Plaintiffs' land, either quantitatively or qualitatively, significantly affects the physical, biological, and chemical integrity of

the Red River of the North located 120 river miles from the property. Even though the Corps has had two years to establish jurisdiction, its Revised JD, like the Initial JD, speaks only to the overall functions provided by wetlands in general and stream headwaters in general and, as the Review Officer found, it does "not speak to how the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical or biological integrity of the downstream TNW "

57. Any further efforts to obtain a permit to conduct peat mining on the Property would be futile, either because the Corps has already decided that it will not issue a permit or because the delay and expense of finally obtaining a permit would substantially impede, if not prevent, Hawkes from proceeding with its plans to mine peat on the Property.

Applicable Tests for Exercise of Jurisdiction Under the CWA

58. The controlling tests for defining "waters of the United States" are Justice Scalia's plurality opinion in *Rapanos v. United States* and Justice Kennedy's significant nexus test.

59. The Revised JD does not meet either applicable test for assertion of jurisdiction under the CWA.

60. First, the Revised JD does not meet Justice Scalia's "relatively permanent" test because there is no substantial evidence that Property contains any "relatively permanent, standing or continuously flowing bod[y] of water" that is connected to a jurisdictional water such that one cannot distinguish tell where the wetlands on Plaintiffs' Property end and the

alleged jurisdictional water begins. *Rapanos*, 547 U.S. at 739 (plurality opinion). Upland area clearly separates the two locations.

61. Second, the Revised JD does not meet Justice Kennedy's "significant nexus" test. No substantial evidence supports the Revised JD's conclusion that a significant nexus exists between the Property and the Red River of the North. The Revised JD does not establish a significant nexus because there is no new evidence in the Revised JD to determine the qualitative or quantitative effect on the Red River of the North. Such evidence is necessary to distinguish between a jurisdictional *significant* nexus and a non-jurisdictional *insignificant* nexus as indicated by the Corps' own Review Officer.

62. Since no substantial evidence exists to support the Revised JD's conclusion that a significant nexus exists between the Property and the Red River of the North, the JD impermissibly assumes, contrary to Justice Kennedy's concurring opinion in *Rapanos*, that a non-speculative effect is necessarily a *significant* effect.

Plaintiffs' Property is not subject to the CWA because it does not contain any "waters of the United States." Therefore, the Revised JD is arbitrary and capricious, contrary to law, and unsupported by substantial evidence. *See* 5 U.S.C.§ 706(2).

**FIRST CLAIM FOR RELIEF—
INJUNCTIVE RELIEF**

63. Plaintiffs hereby reallege and incorporate by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

64. Plaintiffs wish to conduct their business activities on the Property that the Corps wrongfully claims to be subject to its CWA permitting authority.

65. Plaintiffs are and will continue to be directly affected and injured by the Corps' expansive and unlawful assertion of CWA jurisdiction over their Property.

66. The Corps' Revised JD imposes significant injury on Plaintiffs by preventing them from using their Property as they wish without risking an enforcement proceeding, fines, and penalties. The Corps' Revised JD also imposes on Plaintiffs the illegal, burdensome, and expensive requirement that they obtain a Section 404 CWA permit in order to conduct their peat mining activities. As a result, Plaintiffs' use of their property has been, is being—and unless the Court grants relief —will continue to be adversely affected. Hence, the Corps' unlawful exercise of jurisdiction causes Plaintiff irreparable injury.

67. Setting aside the Corps' Revised JD will redress Plaintiffs' injuries by allowing Plaintiffs to use their property.

68. Plaintiffs have no plain, speedy, and adequate remedy at law. Absent judicial intervention, Plaintiff will continue to suffer irreparable injury.

69. The Corps' Revised JD is a final agency action subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. § 320.1(a)(6).

70. Accordingly, injunctive relief enjoining the Corps from exercising jurisdiction under the CWA is appropriate.

SECOND CLAIM FOR RELIEF—DECLARATORY JUDGMENT

71. Plaintiffs hereby reallege and incorporate by reference the allegations contained in all preceding paragraphs as though fully set forth herein.

72. An actual and substantial controversy exists between Plaintiffs and the Corps over the Corps' failure to comply with the CWA in determining that Plaintiffs' Property contains a jurisdictional waterbody.

73. Plaintiffs contend that their Property contains no jurisdictional waterbodies, whereas the Corps, through its Revised JD, contends that it does. The Corps has had two years to develop information supporting its allegations of jurisdiction, there is a complete administrative record on which the Revised JD was made, and any further administrative proceedings before the Corps would be futile. Therefore, no further factual development is necessary to resolve the legal issues raised by this action.

74. The Corps' Revised JD is a final agency action subject to judicial review under the APA. *See* 5 U.S.C. § 702; 33 C.F.R. §§ 320.1(a)(6) & 331.21.

75. The case is currently justiciable because the Corps has unlawfully asserted jurisdiction over Plaintiffs' Property.

76. Plaintiffs are currently and continuously injured by the Corps' unlawful exercise of jurisdiction because the existence of the Revised JD decreases the value of their Property and prevents them from exercising their livelihood on their Property.

77. Plaintiffs are currently and continuously injured by the Corps' unlawful exercise of jurisdiction because they cannot conduct peat mining on their property without fear of an enforcement action being brought against them. The Revised JD increases the likelihood that Plaintiffs will be subject to an enforcement action should they initiate these activities. Further, the Revised JD increases Plaintiffs' potential civil and criminal liability should they initiate these activities.

78. Plaintiffs are currently and continuously injured by the Revised JD because it obligates them to go through the time consuming and expensive process of obtaining a Section 404 permit from the Corps before conducting their proposed activities, and the Corps has informed Plaintiffs in its correspondence of the substantial and expensive area wide research projects that it would require of Plaintiffs' in an effort to obtain a Section 404 permit from the Corps.

79. Plaintiffs are, therefore, entitled to a declaratory judgment declaring that the Revised JD is invalid and that the Corps does not have jurisdiction over the Property pursuant to the CWA.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment as follows:

1. A declaration that Plaintiffs' Property is not subject to the CWA;

2. A declaration that Defendant's Revised Approved Jurisdictional Determination is invalid;

3. An injunction enjoining Defendant from exercising jurisdiction over Plaintiffs' Property;

4. An award of attorney's fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses, and costs; and,

5. For any such other and further relief that the Court deems proper under the circumstances of this case.

DATED: Mar. 13, 2013.

Respectfully submitted,

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

By /s/ GREGORY R. MERZ

GREGORY R. MERZ (185942)
Nancy Quattlebaum Burke (161044)
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 632-3257 / 3029
Attorneys for Plaintiffs

[SEAL OMITTED]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL MINNESOTA 55101-1678

Mar. 15, 2011

REPLY TO
ATTENTION OF

Operations
Regulatory (2007-01914-LSP)

Kevin Pierce, Vice President
Hawkes Peat Company, Inc.
P.O. Box 14111
Grand Forks, North Dakota 58208

Dear Mr. Pierce;

The St. Paul District, Corps of Engineers (Corps) is in receipt of a permit application from Hawkes Peat Company regarding a proposal to expand a peat mining operation at the company's Mercil Site. The project is located in the SW ¼, and S ½, and the NW ¼, Sec. 13, T. 157N., R.44W Marshall County, Minnesota.

The proposed project will involve the expansion of the current peat mining operation near Newfolden, Minnesota by approximately 150 acres. The project will involve the construction of drainage ditches, removal and stockpiling of topsoil overburden, mining of peat over an approximately 20 year time frame and restoration of the site at the cessation of the mining operation.

The Corps has made a preliminary determination that this wetland is a water of the United States and is regulated by the Corps under Section 404 of the Clean Water Act. The activity as proposed would require Department of the Army authorization under Section 404.

The Corps' evaluation of a Section 404 permit application involves multiple analyses, including (1) evaluating the proposal's impacts in accordance with the National Environmental Policy Act (NEPA) (33 CFR part 325), (2) determining whether the proposal is contrary to the public interest (33 CFR § 320.4), (3) determining whether the proposal complies with the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230). Information about the Corps permitting process can be obtained online at http://www.mvp/usace. army.mil/regulatory.

The processing of a standard individual permit for the proposed peat mine will, at a minimum, require an environmental assessment (EA) to satisfy the requirements of NEPA. An EA is used to determine whether an Environmental Impact Statement (EIS) must be prepared to disclose and evaluate the impacts of your proposal. There are two possible outcomes from an EA: a finding of no significant impact (FONSI) or a determination that an EIS will be required. Due to the nature of the proposed site (rich fen), the Corps would like to meet with you to discuss the federal requirements for preparation of environmental documents.

It is our understanding that this project exceeds the state threshold for a mandatory Environmental As-

sessment Worksheet (EAW) and may require the preparation of a state EIS. Therefore, to allow for timely joint review by both state and federal agencies, we recommend that your environmental document address the requirements of both state and federal programs.

We would like to meet with you at your earliest convenience, so that we may discuss with you the information we will need to review your proposal and reach a permit decision. We would also like to coordinate with the State of Minnesota so that both agencies could be represented at the meeting.

Because the proposal involves several state and federal agencies located in St. Paul, this may be the most efficient location for a meeting. If you need additional information or would like to discuss this project further, please contact Larry Puchalski at 218-444-6381, the Corps' project manager for the County in which this proposal is located.

Sincerely,

/s/ [ILLEGIBLE]

for Tamara E. Cameron
Chief, Regulatory Branch

Cf:
Kurt Johnson, NRRI
Steve Hofstad, BWSR
Danny Thorstad, Marshall County SWCD
Garry Bennett, MnDNR Waters, Thief River Falls
Julie Jordan, MnDNR Lands and Minerals, Hibbing
Nathan Kestner, MnDNR Region 1 Environmental Review, Bemidji
Steve Colvin, Unit Director, MnDNR Environmental Review
Randall Doneen, MnDNR Environmental Review Operations Lead, St. Paul
Jennifer Engstrom, MnDNR Mineland Reclamation Manager, St. Paul
Jill Clancy, Corps of Engineers, St. Paul
Steve Eggers, Corps of Engineers, St. Paul

[SEAL OMITTED]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL MINNESOTA 55101-1678

REPLY TO
ATTENTION OF

Operations
Regulatory (2007-01914-DJS)

Aug. 25, 2011

Mr. Kevin Pierce
Hawkes Peat Company Inc.
P.O. Box 14111
Grand Forks, North Dakota

Dear Mr. Pierce:

This letter is in regard to the permit application you submitted on behalf of Hawkes Peat Company Inc., for your proposed peat mining expansion proposal at the Mercil Property Site. The project location is in Section 13, T. 157N., R. 44W., Marshall County, Minnesota.

In order for the Corps to issue a Public Notice (PN) for your proposed project, our regulations require that specific information be submitted for it to be a **complete application.** Items generally necessary for a complete application are listed in 33CFR 325.1. A public notice is the primary method by which the Corps advises interested parties and commenting agencies of the proposed activity. The notice must include information sufficient to explain the nature of the activity and the probable impact on the public

interest. Depending on the scale and magnitude of the proposed project, information sufficient to generate meaningful comment may vary with each proposal. Based on the proposal and comments received, additional resources assessments/studies or analyses evaluating the site or nature of the activity and magnitude of the impacts/effects, individually and cumulatively, may be required during the permit review process.

One specific area of information that is required includes the amount of wetland/waters of the U.S. impacted by filling or dredging and the proposed compensatory mitigation for those impacts. Based on the results of our site visit on June 1, 2011, the wetland determination and general wetland impact assessment you submitted in your application is not sufficient to depict the actual extent, location and type of wetlands at the site and thus, determine the impacts that may result from your proposed project.

During our site visit, we observed additional wetland areas on the parcel that were not included in your wetland determination. The determination submitted in your application utilized the National Wetland Inventory (NWI). The NWI has limited accuracy in several parts of northern Minnesota. Therefore, a wetland delineation completed in accordance with the 1987 Corps of Engineers Wetland Delineation Manual and appropriate Regional Supplement (Great Plains Region) is required.

An understanding of the amount, type and location of wetlands on the project site and an accurate impact assessment is fundamental to our review. Based on the results of the delineation, the overall impacts to

aquatic resources may be greater than the 150 acres identified in your application. The areas of proposed roads, sedimentation basins, drainage ditches and stock piles must also be evaluated for the presence of wetlands. The impact assessment should include the amount of types of wetland impacts of the project including all direct impacts, temporary and permanent (e.g., direct fill and excavation); and all indirect temporary and permanent impacts (e.g., lateral effect as a result of ditching and wetland conversion). Upon receipt of this information, we should be able to issue a public notice of your permit application, in accordance with our regulations, inviting public and resource agency comment on your proposal, which would include the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service.

The following additional information is needed to facilitate our analysis of the potential effects of your proposed project:

1. The depth of peat across the site; the proposed depth of mining and the peat reserves proposed to be left in place at the end of the operation;

2. A hydrogeologic assessment of the rich fen system including the mineral/nutrient composition and pH of the groundwater; groundwater flow spatially and vertically; discharge and recharges areas;

3. A functional/resource assessment of the site including a vegetation survey and identification of native fen plant communities across the site; and

4. An inventory of similar wetlands in the general area(watershed), including some analysis of their quality—to provide some assessment of the extent of the loss of the specified amount and quality of rich fen community relative to the overall amount and quality of that resource in the area (watershed).

5. An inventory of rich fen plant communities that are within sites of High and Outstanding Biodiversity Significance in the area (watershed).

6. Information on potential impacts to unmined upstream portions of this rich fen (i.e. state land to the west) through disruption of groundwater flow, lowering of the water tables, and changes in surface runoff.

7. Details of the proposed road construction and removal and/or mitigation upon closure of the operation.

8. Information on the planned site reclamation as described in your application related to the amount of peat that will be removed from the site due to mining and the anticipated wetland community that will result. Please discuss how this wetland community would replace the functions lost from the existing fen ecosystem.

9. To facilitate our review of your mitigation proposal, please provide us with any examples of successful restorations to a fen community with a similar level of quality.

As discussed with you in March 2011, in order for the Corps to reach a permit decision, the Corps must complete multiple analyses which includes evaluating

the probable impacts of the project in accordance with the National Environmental Policy Act; demonstrating compliance with the Section 404(b)(1) guidelines (alternatives, avoidance and minimization, compensatory mitigation); evaluating the impacts of the activity on the public interest; and demonstrating compliance with other applicable laws, such as the National Historic Preservation Act and the Endangered Species Act.

The Corps would like to meet with you and your agent or consultant to further discuss your alternatives analysis, proposed mitigation and the level of analysis required to comply with the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act (CWA). We also recommend coordinating this meeting with the State of Minnesota, so that both federal and state agencies can be represented at the meeting. Please contact Mr. Dan Seemon in our St. Paul office at (651) 290-5380. In any correspondence or inquiries, please refer to the Regulatory number shown above.

Sincerely,

/s/ [ILLEGIBLE]
for Tamara E. Cameron
Chief, Regulatory Branch

Copy furnished:
Kurt Johnson, NRRI
Danny Thorstad, Marshall County SWCD
Garry Bennett, MnDNR Waters, Thief River Falls
Julie Jordan, MnDNR Lands and Minerals, Hibbing
Nathan Kestner, MnDNR Region 1 Environmental Review, Bemidji
Steve Colvin, Unit Director, MnDNR Environmental Review
Randall Doneen, MnDNR Environmental 1 Review Operations Lead, St. Paul
Jennifer Engstrom, MnDNR Mineland Reclamation Manager, St. Paul
Steve Eggers, Corps of Engineers, St. Paul

ADMINISTRATIVE APPEAL DECISION
HAWKES PEAT COMPANY, INC.
JURISDICTIONAL DETERMINATION
FILE NO. MVP 2007-01914-DJS,
ST. PAUL DISTRICT
Oct. 24, 2012

Review Officer(s): Mr. Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division (Lead)

Ms. Tonya Acuff. U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant/Applicant: Mr. Kevin Pierce, Marshall County, Minnesota

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: 6 April 2012

Date of Acceptance of Request for Appeal: 23 April 2012

Approved JD Appeal Conference Call: 24 July 2012

Summary of Appeal Decision: I find that one of Mr. Pierce's reasons for appeal have merit. There is insufficient documentation in the record to support the finding that the wetland on Mr. Pierce's property, along with other similarly situated wetlands adjacent to the tributary, has a significant (more than insubstantial or speculative) effect on the chemical, physical, and biological integrity of the Red River of the North. The administrative record does not support the District's determination that a significant nexus exists between the subject property wetlands and the traditional navigable water, Red River of the North. The

remaining reasons for appeal have been determined not to have merit.

Background Information:

Mr. Pierce (appellant) is challenging the assertion by St. Paul District, MVP (the "District"), that the U.S. Army Corps of Engineers has jurisdiction over his property. In particular, he alleges that a significant nexus does not exist between the 155 acres of wetlands on his property and the Red River of the North, a navigable water of the United States. The property (known as the Mercil Site) is located in Section 13, Township 157 North, Range 44 West, near Newfolden, Marshall County, Minnesota.

The District contends that the onsite wetlands are adjacent to a non-Relatively Permanent Water (RPW) that flows directly or indirectly into a traditional navigable waterway (TNW) which is the Red River of the North.

The District claims jurisdiction over the wetlands via significant nexus to the downstream TNW.

Mr. Pierce's consultant, Mr. Brian Ross with Widseth, Smith, Nolting & Associates (WSN), provided information in December 2010 to the St. Paul District to establish the lack of Corps jurisdiction of the site's wetlands based on the no hydrologic connectivity to a navigable water of the U.S. There is no question that the site contains wetlands: the appellant is arguing that the wetlands are isolated and therefore, not regulated. The approved jurisdictional determination (AJD) sent to the appellant on 7 February 2012, did not identify the limits of Corps jurisdiction on the site.

The consultant stated that if the site is determined to be jurisdictional, they would furnish a wetland delineation for Corps review at a later date.

Information Received During the Appeal and its Disposition:

1. The District provided a copy of the administrative record (AR), which was reviewed and considered in this request for appeal. The AR was provided on 3 May 2012.

2. The appellant's agent provided clarifying information at the time of the submittal of the RFA.

3. The District provided additional clarifying information via email dated 17 September 2012, regarding procedures used to calculate the drainage basin size at the request of the RO.

Evaluation of the Reason for Appeal/Appeal Decision Findings:

APPEAL REASON #1: There is no basis for jurisdiction because the expansion area wetland[1] is not adjacent to the ditch or the non-Relatively Permanent Water.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "The Corps must show a substantial nexus to the Red River of the North. In order to do so, the Corps must

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[1] This refers to the project area which is a 155-acre expansion of the ongoing peat mining operation.

first connect the river to the expansion area wetland by showing that the expansion area wetland is 'adjacent' to a jurisdictional water" It further states that "there is no wetland adjacent to a 'tributary' or other jurisdictional water here that would allow for the assertion of jurisdiction." Additionally, if the expansion area wetland is to be jurisdictional, it must mean that a jurisdictional water is 'neighboring' the expansion area"

The District staff (William Baer and Craig Jarnot) made a site visit on 1 December, 2011[2] to the property of Mr. Jon Hirst who owns the property southeast of the expansion area. The District observed a non-jurisdictional, man-made ditch located along the northern border of the property (and adjacent to the larger wetland complex). Water flow is described as traveling through the excavated ditch and through the pasture/hayfield. The water then flows into a natural, meandering channel to the Middle River. The District notes that there were ordinary high water (OHW) indicators within the natural channel reach. The indicators were natural lines impressed upon the bank, shelving, changes in the character of the soil, sediment sorting, leaf litter disturbed or washed away, scour, deposition, bed and banks, and changes in the plant community. The rationale for the District's findings that the natural channel contained a definable OHW indicator in accordance with Regulatory Guidance letter (RGL) 05-05[3] is supported in the AR. Accord-

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[2] AR page COE000068

[3] Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark (OHWM), 7 December 2005

ing to the AR, OHW indicators were found in the man-made ditch (matted down, bent, or absent vegetation within the majority of the ditch). However, the AR also noted that it was difficult to tell if this was due to water movement, or wildlife grazing/travel activity.

The expansion area wetland is part of a contiguous, approximately 591-acre complex of wetlands within the Snake River drainage area, HUC 0902309, as demarcated by the United States Geological Service (USGS). The District is asserting jurisdiction over the expansion area via adjacency to non-RPW located along the southern border of the wetland complex. In the Section II.B.1.(a) of the JD form, the District identifies the wetlands as being "adjacent to non-RPWs that flow directly or indirectly into TNWs"

For CWA purposes, the term "adjacent" means bordering, contiguous, or neighboring as stated in 33 C.F.R. 328.3(c). Revised Rapanos guidance, released on December 2, 2008[4], further addresses the definition of adjacency, stating that:

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[4] On June 5, 2007, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (Agencies) issued joint agency guidance regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States ("Rapanos"). In response to comments received, the agencies provided revised guidance on December 2, 2008 (Revised Guidance), which remains the most current and in effect. It may be referenced at: http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx, or http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

> [T]he agencies consider wetlands adjacent if one of the following three criteria are satisfied. First, there is unbroken surface or shallow sub-surface connection to jurisdictional waters. Second, they are physically separated from jurisdictional waters by man-made barriers, natural rivers berms, beach dunes and the like, Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District determined that the project area is part of a larger complex, of which, a portion is adjacent to a drainage ditch and flows ultimately to the Red River of the North. The District indicated current drainage on the site flowed through the man-made ditch, through the natural stream channel, to the Middle River, and then to the Red River of the North, a TNW[5] While the man-made ditch along the southern border of the wetland is not jurisdictional, it provides a discrete hydrologic connection from the wetland to the Red River. Using a non-jurisdictional ditch to establish adjacency to a TNW is supported by the Revised 2008 Guidance[4], which states:

> "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.

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[5] Support for flow rationale is found in AR Pgs COE000020-22 [Figs 2, 3, and 4]; AR pg COE000142 [site visit]

Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water."

This reason for appeal does not have merit because the District supported in the AR the rationale, in accordance with applicable law, regulation, and policy, for stating that the expansion area wetlands are adjacent to the man-made ditch and non-RPW.

APPEAL REASON #2: The Corps mapped the incorrect drainage area for the expansion.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "The Corps has incorrectly mapped the drainage area to overestimate the relevant reach and overstate its claim of any nexus to the Red River of the North. Figure 4 of the JD shows a much more inclusive drainage area for the ravine than actually exists." The appellant states that "furthermore, our analysis of the light detection and ranging (LiDAR) data shows a drainage divide at the north of the main expansion area wetland basin. The LiDAR data shows a northwest to southwest trending trough highlighted by the 1140 contours just north of the drainage divide. North of the drainage divide, there are surface water channels within the wetlands that carry the water to the southeast." The appellant states in the RFA that the drainage area is 551 acres, which is less than the 1

square mile needed to meet the District's definition of tributary "seasonal flow"

In Section III.B.1.i of the JD Form[6], the District identified the drainage area as 2.4 square miles (or 1536 acres) and located within Hydrologic Unit Code (HUC) 09020309, as noted on AR COE000005.

The Corps mapped the drainage area using various hydrology database tools within ArcToolbox and also LiDAR data available[7]

This reason does not have merit because the District supported in the AR the rationale and methods used in determining the drainage basin for the project area. The District used best available information in the determination of the project area's drainage basin. While the appellant stated the drainage area is incorrect, the District supported their methods of using LiDAR and associated program tools to calculate the drainage area.

APPEAL REASON #3: The "relevant reach" is not a tributary or other jurisdictional water.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

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[6] AR page COE000006

[7] Per a clarifying email to the Review Officer dated 17 September 2012, Tim Smith, Regulatory project manager, described the drainage basin mapping techniques used by the Corps in determining the project drainage area.

DISCUSSION: The appellant states in the RFA that "the Corps identifies a 'tributary'[8] of the Middle River that is allegedly part of a relevant reach, but nothing in that location meets the definition of a tributary. Rather, a grassed swale leads to an erosional ravine that incises the upland plain area."

According to the Guidebook[9], "A tributary, as defined here, is a natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW"

Both the Guidebook and the Revised 2008 Guidance state that "A tributary is the entire reach of the stream that is of the same order (ie, from the point of confluence, where two lower order streams meet to form the tributary, downtream to the point such tributary enters a higher order stream.)"

The AR identified the relevant reach on a map labeled Figure 4[10] The map depicts jurisdiction being asserted through the 1,518 linear-foot natural, unnamed tributary which flows into the Middle River. The Middle River ultimately flows into the Red River of the North (TNW). The relevant reach is described in

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[8] AR page COE000022

[9] The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* is used as the U.S. Army Corps of Engineers Regulatory Program Standard Operating Procedures for conducting an approved jurisdictional determination evaluation and the documenting practices to support an approved jurisdictional determination. 2007 version, Page 40.

[10] AR page COE000022

the AR[11] as the confluence of two first order streams which enter the Middle River (a second order stream).

In Section III.B.1.(ii)(c) of the JD form, the District documented the natural tributary used for establishing relevant reach as having both a bed and bank, and OHW indicators which included the features of clear, natural impressed lines on the bank, changes in the character of soil, shelving, leaf litter disturbed or washed away, sediment sorting, and abrupt change in plant community.

This reason for appeal does not have merit because the District supported in the AR the rationale for the identification of the relevant reach used for jurisdiction in accordance with the Regulations.

APPEAL REASON #4: In the RFA, the appellant alleges that a significant nexus does not exist between the expansion area wetland and the Red River of the North. The following are several specific reasons for appeal relating to the District's determination:

APPEAL REASON 4(a): There is no significant chemical connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the chemical integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall

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[11] AR page COE000016

document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands. Specifically, the District will document the volume, duration, and frequency of water flow from the wetlands to the TNW.

DISCUSSION: The appellant stated in the RFA that "the District provides no measureable or quantitative data on how the expansion area wetlands would affect the Red River of the North. The Corps only talks in generalities about the functions of headwater streams and their importance for nutrient transformation"

In the AR[12], the District described the stream chemical properties as follows:

> "[S]urface flows were not observed in the tributary by the Corps staff. The contributing area to the tributary is predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings. Water quality has not been formally assessed by the MPCA but is expected to be good based on adjacent land uses, amounts of wetlands in the area, and buffers from the tributary."

The District states in the additional significant nexus information[13] that "there is no water quality data for the unnamed tributary. However, general inferences about potential pollutants can be made by evaluating the land use within, and upstream of, the drainage area of the relevant reach. The contributing area to the tributary is predominantly comprised of open spaces

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[12] AR page COE000008

[13] AR page COE000016

with limited agricultural usage (row crops and hay) and residential dwellings. In general, areas with limited impervious and agricultural use have a better water quality and are less likely to have water quality impairment. As a result, the discharges from the relevant reach would be viewed as having a beneficial effect on the downstream TNW."

The 2008 Guidance states " agencies will consider other relevant factors, including the functions performed by the tributary together with the wetlands, and any adjacent wetlands, which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream food webs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream) "

The AR does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states[14] that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date given to support the finding.

The District's use of the word "suggest", and "reasonable to conclude" in their descriptions of ground water influence on tributary flow implies speculation. There were no specific facts documented that could verify these assertions.

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[14] AR page COE000016

APPEAL REASON 4(b): There is no significant physical connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the physical integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic functions performed by the tributary and all of its adjacent wetlands. Specifically, the District will document the number of flow events per year, volume, duration, and frequency of flow events from the wetlands to the TNW.

DISCUSSION: The appellant stated in the RFA that "the physical connection between the expansion area wetland, and any wetlands in the relevant reach to the Red River of the North, is insignificant because the drainage area is small and outflow is limited by the basin orientation." The RFA further states that there is little to no runoff of water from the wetlands to the TNW, therefore there is no significant physical connection of runoff reaching the river.

The District identified a 155-acre forested wetland on the appellant's property, and determined that this wetland area is part of a larger wetland complex that is adjacent to an unnamed, non-RPW tributary. Per the

Rapanos guidance, a wetland adjacent to a non-RPW requires a significant nexus evaluation[15]

The 155-acre wetland in question is located within a larger 550-acre wetland complex. The complex wetlands are adjacent to a 448 linear-foot, non-jurisdictional drainage feature that flows approximately 512 feet into an unnamed tributary of the Middle River for 1518 linear feet, into the Middle River which then flows into the Red River of the North. Ultimately, the water flows through two tributaries, and 30 or more miles, before entering the TNW.

The AR included documentation regarding precipitation amounts, snowfall amounts, watershed size, drainage area, and estimated acre-feet of water storage within the wetlands[16], but did not contain any estimated flow events per year. The unnamed tributary was determined by the District to have a bed and bank and an OHW indicator in accordance with RGL 05-05[3]

In regards to the "physical" nexus with the downstream TNW, the District described stream surface flow as follows:

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[15] In his concurring opinion in *Rapanos*, Justice Kennedy concluded that wetlands are waters of the United States "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable'" According to the *Rapanos* guidance, similarly situated wetlands include all wetlands adjacent to the same tributary, thus in this case, all wetlands adjacent to the man-made ditch must be included in the significant nexus evaluation.

[16] AR page COE000023

> "The District was only able to observe the tributary once on December 1, 2011. At that time, there was no surface flow in the channel but pools were observed sporadically throughout its length. These observations were made at a severe drought in this portion of Minnesota and suggest that there is a groundwater component to the flow in the channel. To further evaluate flow in the tributary the District utilized its seasonal stream evaluation protocol. In general, tributaries that have drainage areas in excess of one square mile typically meet the agency's definition of seasonal flow (continuous flow for at least three months). The drainage area for the unnamed tributary was determined to be 2.4 square miles or almost 2.5 times the threshold identified during the District's assessment of flow duration on first and second order tributaries. Given this information, it is reasonable to conclude that the tributary has seasonal flow between ice out and mid-June. Flow may persist longer in years with normal precipitation of groundwater discharge is supplying flow to the tributary. However, additional site investigations would be required to confirm this contribution"

Additional tributary flow information was provided in the supplemental significant nexus attachment[17] provided in the AJD. The District stated that:

> "Flow in the unnamed tributary has not been qualitatively assessed and the only direct observations of the channel were made in December of 2011 at which time there was standing water in pools but no

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[17] AR page COE000016.

> continuous flow. In northern Minnesota, it is expected that for this type of stream channel, velocity would typically be highest in the spring (March and April) in response to snowmelt and precipitation. Stream flow would steadily decline through late April and May and would be expected to completely dissipate by sometime in June or July when evapotranspiration rates are highest. Flow may be observed periodically outside of this time frame in response to precipitation events."

The 2008 Revised Guidance states that "Principle considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour."

While the AR[18] provides information indicating an OHW mark for the unnamed tributary exists, it does

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[18] AR page COE000068

not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW. The District stated that flow was present during the site visit; however, the District could not definitively identify any type of flow present in the channel by either precipitation runoff or by groundwater flow. Additionally, the District stated that additional site investigations would be needed to determine the site's hydrologic connectivity.

APPEAL REASON 4(c): There is no significant biological connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide additional documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the biological integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.

DISCUSSION: The appellant states in the RFA that "the ravine and the expansion area wetland provide no fish habitat to support a biological connection. The ravine is without flowing water during a vast majority of the year, and in some years there is no flow in the ravine at all. Furthermore, the Middle River biome, a bottomland forest, is different from the Mercile wetland (expansion area), a rich fen, and so they are not

connected biologically or ecologically, and they are separated by a twenty-foot vertical gradient."

The AR[19] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW. However, the water flow regime information was not sufficient to indicate that a significant nexus exists. As indicated in Reason 4(b), field assessments did not provide evidence of water flow.

The 2008 Guidance states " habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping."

The District also did not indicate if the expansion area wetland supports any aquatic/wildlife diversity. The AR[20] mentioned aquatic species that the Red River of the North supports, but no mention of species being located within the tributary or wetland. Additional information is needed to indicate if the wetland provides any significant biological/ecological contribution to the TNW.

CONCLUSION:

In discussing the significant nexus in the Rapanos memo, Justice Kennedy stated: "The required nexus must be assessed in terms of the status's goals and purposes. Congress enacted the Clean Water Act (CWA) to 'restore and maintain the chemical, physi-

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[19] AR page COE000008

[20] AR page COE000018

cal, and/or biological integrity of the Nation's waters " Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters. While the District does not need to clearly support all three attributes, they do need to clearly support that the onsite wetlands and tributary provide more than a speculative or insubstantial effect on the physical, chemical, or biological integrity of the Red River of the North. The decision is being remanded to document whether a significant nexus does indeed exist between the onsite wetlands and tributary and the Red River of the North for any of the attributes.

Based on the information contained in Reason #4 (a), (b), and (c), the AR does not provide sufficient documentation to establish a significant nexus between the expansion area wetlands and the Red River of the North based on the information provided.

The District speaks to the overall functions provided by stream headwaters, the similarly situated wetlands, and wetlands in general, within the review area. However, they do not speak to how the functions that the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical, or biological integrity of the downstream TNW

For the reasons stated above, I find that the appeal has merit since the District's AR does not support its determination that the subject property contains jurisdictional wetlands and waters. I am remanding the AJD back to the District for reconsideration in light of

this decision. The District shall complete these tasks within 60 days from the date of this decision and upon completion, provide the Division office and appellant with its decision document and final AJD.

/s/ [ILLEGIBLE]
for John W. Peabody
Major General, U.S. Army
Commanding

Supreme Court, U.S.
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In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. 1362(7); see 33 U.S.C. 1251 *et seq.*, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 782 F.3d 994. The opinion of the district court (Pet. App. 22a-43a) is reported at 963 F Supp. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2015. A petition for rehearing was denied on July 7, 2015 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on September 8, 2015, and the petition was granted on December 11, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-26a.

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); see Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*). Section 301 of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). "[D]ischarge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7); see *Rapanos* v. *United States*, 547 U.S. 715, 724-725 (2006) (plurality opinion); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

The CWA provides that any pollutant discharge into the waters of the United States must be authorized, either by the statute itself or by a permit granted by the United States Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), or an authorized State. 33 U.S.C. 1344 (permit program for discharge of dredged or fill materials); see 33 U.S.C. 1342 (2012 & Supp. II 2014) (permit program for discharge of other pollutants). "Compliance with a permit issued pursuant to" Section 1344 "shall be deemed compliance" with, *inter alia*, Section 1311's general ban on discharges of pollutants into navigable waters.

33 U.S.C. 1344(p). The Act establishes an enforcement framework that subjects a landowner or other person who has engaged in an unauthorized discharge to civil penalties and, for certain negligent or knowing violations, criminal prosecution.[1] 33 U.S.C. 1319. In addition to establishing various government enforcement mechanisms, the CWA authorizes aggrieved private citizens to file suit against persons who are alleged to have made unlawful pollutant discharges into waters of the United States. See 33 U.S.C. 1365(a)(1) and (f); *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1333-1334 (2013). A landowner who plans to discharge pollutants therefore must determine whether its interests would be best served by seeking a permit, or whether it is sufficiently confident that its activities will not violate the CWA to proceed without first seeking a permit.

In making that determination, the landowner must assess, *inter alia*, whether the property in question contains waters of the United States, such that the CWA's provisions apply to discharges of pollutants into those waters. The CWA itself does not establish any mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites. See generally 33 U.S.C. 1319, 1344. In order to assist property owners in evaluating their statutory options, however, the

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[1] The CWA's provisions apply to any "person" who makes an unauthorized discharge into waters of the United States, regardless of whether the person owns the property on which the waters are found. See, *e.g.*, 33 U.S.C. 1319(a). For simplicity, this brief refers to "landowners" or "property owners" as examples of the persons to whom the Act applies.

Corps has long responded to inquiries concerning whether particular waters fall within the CWA's coverage. See, *e.g.*, Dep't of the Army, Office of the Chief of Eng'rs, & EPA, *Memorandum of Understanding, Geographical Jurisdiction of the Section 404 Program* 1 (1980) (*Memorandum*) (on file with the Office of the Solicitor General) (stating that the "District Engineer" will, in response to "pre-application inquiries," "establish the boundaries of the waters of the United States, as they apply to the inquiry, at the earliest possible date").

The Corps' regulations authorize (but do not require) the Corps to provide an inquiring party with a "[j]urisdictional determination" that expresses the agency's view on whether a particular property contains "waters of the United States" that are subject to the agency's regulatory authority under Section 404 of the CWA, 33 U.S.C. 1344. 33 C.F.R. 331.2 (emphasis omitted); see 33 C.F.R. 320.1(a)(6), 325.9; see also 33 C.F.R. Pt. 331, App. C. The applicable regulations define the term "jurisdictional determination" as "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or * * * Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*)." 33 C.F.R. 331.2. That definition further provides that jurisdictional determinations "do not include determinations that a particular activity requires a * * * permit." *Ibid.* Neither the CWA nor its implementing regulations require a landowner to obtain a jurisdictional determination before discharging dredged or fill material.

An "[a]pproved jurisdictional determination" is "a Corps document stating the presence or absence of

waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel."[2] 33 C.F.R. 331.2 (emphasis omitted). An approved jurisdictional determination is valid for five years, 33 C.F.R. Pt. 331, App. C, "unless new information warrants revision of the determination before the expiration date." Corps, Regulatory Guidance Letter No. 05-02, ¶ 1 (June 14, 2005) (RGL 05-02). When the Corps issues an approved jurisdictional determination, an affected party may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331.

The Corps issues tens of thousands of approved jurisdictional determinations every year. See 80 Fed. Reg. 37,065 (June 29, 2015); Corps, *Regulatory—Protecting the Integrity of America's Waters* (Feb. 2, 2015), http://www.usace.army.mil/Portals/2/docs/civilworks/budget/strongpt/fy16sp_regulatory.pdf (*Regulatory*). Few approved jurisdictional determinations are appealed. The Corps informs this Office that in fiscal year 2015, interested parties filed eight adminis-

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[2] Where appropriate, this brief uses the term "affirmative jurisdictional determination" to refer to a Corps determination that waters of the United States are present at the relevant site, and "negative jurisdictional determination" to refer to a Corps determination that such waters are not present. The Corps' regulations also provide for issuance of preliminary jurisdictional determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. 331.2. Preliminary jurisdictional determinations thus may delineate waters on a site, but they do not reflect any considered assessment of whether "waters of the United States" are present. *Ibid.*; see Corps, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008).

trative appeals of approved jurisdictional determinations issued outside of the permitting process.

2. Whether or not a jurisdictional determination has been requested or issued, a landowner planning to discharge dredged or fill material has two options under the CWA. It may seek a permit, or it may proceed without one.

a. Section 404 of the Act, 33 U.S.C. 1344, authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a); see 33 U.S.C. 1344(d); see also 33 C.F.R. Pts. 323, 325; 40 C.F.R. Pt. 230. Section 404 provides for both individual permits and general permits. 33 U.S.C. 1344(a) and (e). The effect of either an individual or general permit is to render lawful discharges undertaken in accordance with its terms. See 33 U.S.C. 1311(a), 1344(p).

The overwhelming majority of discharges are authorized under general permits, each of which authorizes a particular category of activity within a specified geographic area. The CWA authorizes the Corps to issue general permits on a state, regional, or nationwide basis. 33 U.S.C. 1344(e)(1); 33 C.F.R. Pt. 330 (nationwide permit program). The general-permit program serves to promptly authorize activities that involve pollutant discharges into covered waters but will have only minimal adverse effects on waters of the United States. 77 Fed. Reg. 10,268 (Feb. 21, 2012) ("Nationwide permits help relieve regulatory burdens on small entities who need to obtain [Corps] permits" by "provid[ing] an expedited form of authorization.").

When the Corps receives a Section 404 permit application, it first determines whether the proposed

discharge is covered by an existing general permit. 33 C.F.R. 330.1(f). If the Corps verifies that the discharge falls within the terms of a general permit, the landowner may proceed.[3] A discharge made in compliance with the conditions imposed by an applicable general permit thus may be lawfully undertaken without an individual permit. See generally 33 C.F.R. 330.1.

There are currently 50 nationwide general permits. 77 Fed. Reg. at 10,184 (reissuing 48 existing nationwide permits and issuing two new ones). They authorize, for example, minor discharges (Nationwide Permit 18), minor dredging (Nationwide Permit 19), certain restoration activities (Nationwide Permit 27), residential developments with minor impacts (Nationwide Permit 29), and agricultural activities with minor impacts (Nationwide Permit 40). *Id.* at 10,202-10,203, 10,214-10,218, 10,223-10,224, 10,273, 10,275-10,276, 10,279.

If a landowner files a permit application and no general permit covers the proposed discharge, the Corps then determines whether an individual permit should be issued. 33 U.S.C. 1344(a); 33 C.F.R. 330.1(c) and (d). An individual permit may be necessary for larger projects with a greater impact on waters of the United States. The individual-permit program ensures that an applicant avoids or minimizes impacts on waters of the United States and provides compensatory mitigation for any remaining unavoidable impacts

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[3] Some general permits provide that a person whose discharge meets the terms and conditions of the permit need not apply for the permit or otherwise notify the Corps before proceeding with the discharge. See 33 C.F.R. 330.1(e), 330.4(a).

on such waters. See, *e.g.*, 33 C.F.R. 320.4(r), 332.1; 40 C.F.R. Pt. 230.

In evaluating a permit application, the Corps considers, *inter alia*, the impact of the planned discharge on covered waters, available alternatives, and whether any conditions should be placed on the discharge. See generally 33 C.F.R. 320.4, Pt. 325; 40 C.F.R. 230.10. As part of the permit-application process, the landowner may place CWA coverage in issue by requesting a preliminary or approved jurisdictional determination. See 33 C.F.R. 331.2; Corps, Regulatory Guidance Letter No. 08-02, ¶¶ 1-4, 7 (June 26, 2008) (RGL 08-02). Thus, if the agency has not already provided a jurisdictional determination in response to the landowner's request, the Corps will prepare one upon request in the context of the permitting process. RGL 08-02 ¶ 2.

The Corps informs this Office that in fiscal year 2015, the Corps issued more than 54,000 general-permit verifications and 3100 individual permits. The majority of individual-permit applications were authorized within 120 days of application, and most requests for verification of general-permit authorizations were completed within 60 days. The Corps denied 97 permit applications. Permit denials are unusual because the Corps is ordinarily able to issue a permit authorizing the discharge, including by imposing conditions on the discharge that are developed in consultation with the applicant. If the Corps is unable to authorize the discharge or the applicant rejects the proposed conditions, the permit is denied. 33 C.F.R. 331.2.

If the applicant has exhausted administrative remedies and is dissatisfied with the Corps' final permit-

ting decision, it may seek judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In such an APA challenge, the applicant may contest, *inter alia*, the Corps' determination that the property at issue contains waters protected by the CWA. 33 C.F.R. 331.5(a)(2); see, *e.g.*, *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006); 33 C.F.R. 331.12.

b. Alternatively, a landowner may proceed without seeking a permit. The landowner might do so because it believes that its property does not contain waters regulated by the CWA, or because it believes that its activities do not require a permit even if covered waters are present. The CWA exempts discharges into regulated waters resulting from numerous activities, including normal farming and certain road-maintenance activities, from the permitting requirements. 33 U.S.C. 1344(f). If a discharge into waters of the United States is not authorized by the statute or by a permit, however, the property owner may be liable for civil penalties that accrue each day the violation persists.[4] 33 U.S.C. 1319(d). If the government determines that a discharge violates the CWA, it may take enforcement action.

In such a circumstance, the government may proceed administratively, including by issuing a warning letter, a "cease and desist" order, 33 C.F.R. 326.3(c),

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[4] The Act initially authorized a per-day penalty of up to $25,000. 33 U.S.C. 1319(d). Congress subsequently authorized the EPA to adjust the maximum penalty for inflation, see 28 U.S.C. 2461 note, and the current maximum per-day penalty is $37,500. 74 Fed. Reg. 627 (Jan. 7, 2009).

or an administrative compliance order, see 33 U.S.C. 1319(a). The recipient of an EPA compliance order may bring suit under the APA to challenge the order, and it may contend that the property is not covered by the CWA. See *Sackett* v. *EPA*, 132 S. Ct. 1367, 1370-1371 (2012). The government also may institute an administrative proceeding to impose civil penalties. 33 U.S.C. 1319(g). The Act provides for judicial review of administrative penalty orders, 33 U.S.C. 1319(g)(8), and the landowner may challenge the order on the ground that the CWA does not apply to the property in question.

The government may also bring an enforcement action in district court to obtain injunctive and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may contend, *inter alia*, that its conduct did not violate the CWA because it did not involve a discharge into "waters of the United States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-703 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). An aggrieved private plaintiff may also commence a citizen suit, alleging that the defendant unlawfully discharged pollutants into waters of the United States, see 33 U.S.C. 1365(a)(1) and (f), and the defendant may contest the issue of CWA coverage in that context as well.

In any of those enforcement proceedings, a landowner's prior receipt of an affirmative jurisdictional determination does not alter its rights or obligations or expose it to additional penalties if its conduct is found to have violated the CWA.

3. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court

are subject to judicial review." 5 U.S.C. 704. "As a general matter, two conditions must be satisfied for an agency action to be 'final'" under the APA. *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (citation and internal quotations omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (citation and internal quotations omitted).

In *Sackett*, *supra*, this Court held that an EPA compliance order is "final agency action" subject to judicial review under the APA, 5 U.S.C. 704. See 132 S. Ct. at 1371-1372. A compliance order reflects the EPA's determination that a landowner has violated the CWA or a permit issued under the CWA. See *ibid.*; 33 U.S.C. 1319(a)(3). The Court in *Sackett* explained that the compliance order at issue in that case represented the "consummation" of the agency's decisionmaking process because the EPA's conclusion that the Sacketts had violated the CWA was not subject to further review within the agency. 132 S. Ct. at 1372 (quoting *Bennett*, 520 U.S. at 178) (internal quotation marks omitted). The Court also concluded that the compliance order "determined rights or obligations." *Id.* at 1371 (quoting *Bennett*, 520 U.S. at 178). The Court explained that the order by its terms imposed "the legal obligation to 'restore'" the property in question, and that the order required the Sacketts to give the EPA access to their property. *Ibid.* In addition, the order imposed "legal consequences" by "expos[ing] the Sacketts to double penalties in a future

enforcement proceeding" and "severely limit[ing] [their] ability to obtain a permit" under the CWA. *Id.* at 1371-1372.

4. a. Respondents Pierce Investment Company and LPF Properties, LLC, own 530 acres of land in Minnesota. Respondent Hawkes Co., Inc. (Hawkes), would like to mine a portion of that property for peat, which is formed in wetlands. Hawkes has an existing peat-mining operation nearby and would pay royalties to the respondent property owners. Pet. App. 5a-6a, 23a.

In December 2010, Hawkes applied for a Section 404 permit from the Corps. In March 2011, the Corps informed Hawkes of the Corps' preliminary determination that the property contains waters of the United States. Pet. App. 6a. In February 2012, after further meetings and visits to the property, the Corps provided Hawkes with an approved jurisdictional determination, which concluded that the property contains waters of the United States. *Id.* at 6a-7a. Respondents' complaint alleges that, during the process of developing the jurisdictional determination, Corps employees asserted that the permit process would be costly and time-consuming. *Id.* at 6a; J.A. 15-16 (Am. Compl. ¶ 40).

Respondents filed an administrative appeal of the approved jurisdictional determination. In October 2012, finding that the approved jurisdictional determination lacked sufficient analysis to support a finding of regulatory jurisdiction, the Corps' Mississippi Valley Division remanded the approved jurisdictional determination for reconsideration by the Corps' district office. Pet. App. 7a, 44a. In December 2012, the Corps issued a revised approved jurisdictional deter-

mination, which again concluded that the property contains waters of the United States. *Id.* at 7a-8a, 44a-102a. The revised approved jurisdictional determination explained that the property contains approximately 150 acres of wetlands that are adjacent to waters that flow directly or indirectly into traditional navigable waters. *Id.* at 50a-51a. The wetlands at issue are of "exceptional quality"—they are considered a "Rich Fen" with "high vegetative biodiversity," and they are "correctly given an outstanding statewide biodiversity significance ranking by the [State]." *Id.* at 64a. After examining the effect of the wetlands on the chemical, physical, and biological integrity of the traditionally-navigable Red River of the North, the Corps concluded that the wetlands have a significant nexus with that river. *Id.* at 83a-100a.

Respondents' permit application is currently pending. The State of Minnesota, which is jointly reviewing the project with the Corps, has requested that respondents provide certain additional information. Because that request is outstanding, the Corps has not yet made a decision on the permit.

b. In 2013, respondents filed this action, alleging that the Corps' jurisdictional determination was arbitrary and capricious under the APA, 5 U.S.C. 706(2). Pet. App. 8a, 27a. The Corps moved to dismiss the suit, arguing that the jurisdictional determination was not "final agency action" subject to judicial review under the APA, 5 U.S.C. 704, and that respondents' challenge to the jurisdictional determination was not ripe. Pet. App. 8a.

The district court dismissed the suit. Pet. App. 22a-43a. The court held that the Corps' jurisdictional determination was not final agency action under *Ben-*

nett. *Id.* at 31a. The court concluded that, although the jurisdictional determination "satisfies the first *Bennett* condition" because it marks the consummation of the agency's decisionmaking process, *id.* at 32a, it "does not satisfy the second *Bennett* condition" because "it does not determine [respondents'] rights or obligations," *id.* at 34a.

5. a. The court of appeals reversed. Pet. App. 1a-17a. The court held that a jurisdictional determination is a reviewable "final agency action" under the APA. *Id.* at 16a-17a. In the court's view, "the Court's application of its flexible final agency action standard in *Sackett*" indicated that a jurisdictional determination should be considered final agency action. *Id.* at 5a.

The court of appeals first held that the jurisdictional determination satisfied *Bennett*'s first prong because it "was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority." Pet. App. 9a. The court explained that the Corps' regulatory guidance describes an approved jurisdictional determination as a "definitive, official determination." *Ibid.* (citation omitted).

Turning to *Bennett*'s second prong, the court of appeals concluded that an approved jurisdictional determination determines "rights and obligations" and imposes "legal consequences." Pet. App. 10a. The court found little difference between "an agency order that compels affirmative action," such as the EPA compliance order at issue in *Sackett*, and a jurisdictional determination, which, in the court's view, "prohibits a party from taking otherwise lawful action." *Id.* at 11a. The court stated that a jurisdictional de-

termination "requires [respondents] either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." *Ibid.*

The court of appeals also held that "there is no other adequate [judicial] remedy" if immediate judicial review of the Corps' jurisdictional determination is unavailable. Pet. App. 13a (citation omitted; brackets in original); see 5 U.S.C. 704. While acknowledging that respondents could seek a permit and then obtain judicial review of the Corps' decision on their application, the court asserted that, "as a practical matter, the permitting option is prohibitively expensive and futile." Pet. App. 14a. The court also stated that respondents' "other option—commencing to mine peat without a permit and await an enforcement action—is even more plainly an inadequate remedy" because respondents could incur "huge additional potential liability" by doing so. *Ibid.* (citing *Sackett*, 132 S. Ct. at 1372).

b. Judge Kelly filed a separate concurring opinion. Pet. App. 18a-21a. She described the reviewability issue presented here "as a close question." *Id.* at 18a. She observed that a jurisdictional determination does not alter the recipient's legal obligations in the way that the compliance order in *Sackett* did. *Id.* at 18a-20a. Judge Kelly concluded, however, that a jurisdictional determination should be immediately reviewable to provide the landowner an opportunity, before seeking a permit, "to show the CWA does not apply to its land at all." *Id.* at 20a.

6. The court of appeals denied the Corps' petition for rehearing en banc and for panel rehearing. Pet. App. 103a-104a.[5]

SUMMARY OF ARGUMENT

A Corps jurisdictional determination is not subject to judicial review under the APA because it is not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

A. A landowner that wishes to discharge pollutants may seek a permit from the Corps if it wishes to ensure that its conduct complies with the CWA, or it may discharge without a permit if it is sufficiently confident that the relevant site does not contain waters of the United States. The Corps' issuance of a jurisdictional determination does not expand or contract the landowner's options; it simply provides additional information that the landowner may find useful in choosing between those alternative courses of conduct. Jurisdictional determinations thus are one of the many ways in which administrative agencies respond to inquiries from regulated parties concerning the application of a given legal framework to particular factual circumstances. Courts have generally

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[5] After the court of appeals issued its decision in this case, the Corps and the EPA issued a rule clarifying the agencies' interpretation of the scope of waters covered by the CWA. See 80 Fed. Reg. at 37,055; see also 79 Fed. Reg. 22,188 (Apr. 21, 2014). That rule is not relevant here because it governs jurisdictional determinations issued after its effective date, 80 Fed. Reg. at 37,054, 37,073-37,074, and the jurisdictional determination at issue here substantially predated the new rule. The Sixth Circuit has stayed the new rule. See *In re: EPA & Dep't of Def. Final Rule; "Clean Water Rule: Definition of Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015), at 6, No. 15-3799 (Oct. 9, 2015).

recognized both that such agency informational efforts inure to the public's benefit, and that allowing judicial challenges to this type of guidance would discourage agencies from responding to public inquiries.

B. A jurisdictional determination is not "final agency action" because it does not determine legal rights or obligations, or impose legal consequences. An affirmative jurisdictional determination states the Corps' conclusion that waters of the United States are present at the relevant site, but it does not direct the landowner to take or refrain from taking any particular action, and it does not affect the landowner's ability to seek and obtain a permit. If the landowner subsequently discharges pollutants and is subjected to some form of enforcement action alleging a violation of the CWA, the Corps' prior jurisdictional determination will not prevent the landowner from disputing the CWA's applicability, will not alter the burden of proof in the enforcement proceeding, and will not subject the landowner to additional penalties if a violation is found. In its lack of legal effect, a jurisdictional determination is similar to various types of informal agency guidance that courts have generally found to be non-"final" under the APA.

As a practical matter, a landowner who receives an affirmative jurisdictional determination may have a greater incentive to seek a permit before discharging pollutants than someone who has not received such a determination. But treating that sort of practical impact as a sufficient ground for deeming jurisdictional determinations to be "final agency action" would subvert the established understanding that informal agency guidance is not judicially reviewable,

since the core rationale for agency informational efforts is that regulated parties may give weight to the agency's views. This Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), which held that a Federal Trade Commission (FTC) complaint was not reviewable "final agency action" even though it compelled the subject of the complaint to participate in an administrative hearing, *id.* at 239-240, reinforces the conclusion that a jurisdictional determination's practical impact is an insufficient ground for finding it to be "final."

In particular, a jurisdictional determination is unlike the biological opinion at issue in *Bennett* v. *Spear*, 520 U.S. 154, 157 (1997), or a discharge permit issued by the Corps pursuant to 33 U.S.C. 1344. Under the applicable statutory schemes, those agency actions have operative legal effect by legitimizing—*i.e.*, actually rendering lawful—private conduct that would otherwise be prohibited. A Corps jurisdictional determination, by contrast, reflects the agency's assessment of whether waters of the United States are present at a particular site, but it cannot change the actual legal status of any pollutant discharge. The court below cited no case in which this Court has treated as "final agency action" an agency communication like this one, which simply states the agency's non-binding view about the proper application of a pre-existing legal standard to a particular factual setting.

The court of appeals' reliance on *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), was also misplaced. The Court in *Sackett* found an EPA compliance order to be reviewable "final agency action." Unlike a jurisdictional determination, however, the compliance order di-

rected the recipient landowners to take specific actions, and it substantially increased the penalties to which they were potentially subject. The Court in *Sackett* relied on those operative legal effects, rather than on the landowners' practical incentive to conform their conduct to the agency's stated views, in holding that the compliance order was subject to APA review. *Id.* at 1371-1372.

C. Even if the Corps' jurisdictional determination were "final agency action," it would not be subject to judicial review because the statutory scheme provides other "adequate" avenues by which the issue of CWA coverage can be contested in court. A landowner can seek judicial review if the Corps denies its permit application, or issues a permit on conditions that the applicant opposes, and the landowner can argue in the judicial proceeding that the relevant tract does not contain waters of the United States. A recipient of an affirmative jurisdictional determination who elects to proceed with discharges may also obtain judicial review of the CWA coverage issue if the government brings an enforcement proceeding or an aggrieved private plaintiff commences a citizen suit. Since the CWA does not require the Corps to issue jurisdictional determinations at all, and nothing in the Act suggests that Congress specifically anticipated that practice, Congress evidently regarded those other avenues of judicial review as providing "adequate" opportunities to litigate disputed questions of CWA coverage.

ARGUMENT

A JURISDICTIONAL DETERMINATION IS NOT IMMEDIATELY REVIEWABLE UNDER THE APA BECAUSE IT IS NOT "FINAL AGENCY ACTION" AND BECAUSE THERE ARE OTHER ADEQUATE PATHS TO JUDICIAL REVIEW

The Corps issues jurisdictional determinations in response to requests from property owners, in order to inform the owners of the Corps' view on whether their property falls within the CWA's coverage. That salutary practice gives property owners additional information that may assist them in choosing among their available options, but receipt of a jurisdictional determination does not alter the recipient's legal obligations.

The court of appeals erred in concluding that the jurisdictional determination "requires [respondents] either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." Pet. App. 11a. The jurisdictional determination does not create the quandary that concerned the court. Rather, the CWA itself requires a landowner to obtain a permit before discharging any pollutant into waters of the United States and imposes penalties for engaging in unpermitted discharges. The landowner faces precisely the same set of options, and precisely the same exposure to penalties for any CWA violations, whether or not it has received a jurisdictional determination. A jurisdictional determination is therefore not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

A. Jurisdictional Determinations Assist Landowners To Assess Their Rights And Obligations Under The CWA

1. The CWA requires any person to obtain a permit before engaging in an unauthorized discharge of pollutants into waters of the United States, or to face statutory penalties for violating the Act. An entity who wishes to discharge pollutants thus has a choice. If it believes that the CWA may apply to waters on its property and that a discharge permit may be required, it may seek a permit from the Corps. As part of the permitting process, the property owner may argue that the CWA does not apply, and it may obtain an agency coverage determination that will be subject to judicial review along with the agency's ultimate permitting decision. 33 C.F.R. 331.5(a)(2).

Alternatively, the property owner may proceed without a permit if it believes either that the relevant site does not contain waters of the United States or that the discharge falls within a statutory or regulatory exception to the CWA's permitting requirement. See pp. 9-10, *supra*. In a suit for judicial review of an agency enforcement action, or in a judicial-enforcement suit alleging that the landowner's discharges were unlawful, the property owner may argue that its conduct did not violate the Act for either of those reasons. The landowner risks being subject to statutory penalties, however, if its view of the coverage question is ultimately rejected and it is found to have violated the CWA.

2. In order to assist landowners and others in evaluating their potential statutory obligations, the Corps allows them to request a jurisdictional determination that provides the agency's view on whether the property in question contains waters of the United

States. The CWA itself does not require the Corps to provide jurisdictional determinations to anyone. Rather, the Corps has historically provided the determinations on request, either as a standalone document or in the course of considering a permit application. See pp. 3-6, *supra*; see also *Memorandum* 1-2.

Neither the CWA nor any Corps regulation requires a landowner to request a jurisdictional determination under any circumstances. If a landowner believes that the site of its contemplated discharges does not contain waters of the United States, it may proceed with those discharges without first requesting or receiving confirmation that the Corps shares that view. A landowner also may apply for a permit without first requesting a jurisdictional determination.

A landowner who procures a jurisdictional determination, however, has the advantage of knowing the Corps' current, considered view as to whether there are waters of the United States on the landowner's property. The landowner can take that additional information into account in assessing the relative advantages and disadvantages of the options available to it. If the jurisdictional determination states the Corps' conclusion that waters of the United States are present at the relevant site, but the landowner disagrees with that assessment, the landowner is not required to conform its conduct to the agency's view. If the landowner instead proceeds to discharge pollutants without a permit, and the government commences some form of enforcement action, the dispositive question will be whether the landowner's conduct violated the Act, not whether it was consistent with the jurisdictional determination. In such a proceeding, the landowner's prior receipt of a jurisdictional

determination likewise will not increase its exposure to statutory penalties if a violation is ultimately found to have occurred. See Part B, *infra*. The frequency with which jurisdictional determinations are requested and received (the Corps issues tens of thousands of jurisdictional determinations every year, see *Regulatory*) attests to the usefulness of that mechanism to persons contemplating pollutant discharges.

Jurisdictional determinations are thus one example of the salutary administrative practice of responding to inquiries from potentially regulated parties concerning the application of a given legal framework to particular factual circumstances. See *American Fed'n of Gov't Emps., AFL-CIO* v. *O'Connor*, 747 F.2d 748, 754 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (describing such actions as a "valuable public service"), cert. denied, 474 U.S. 909 (1985); *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) ("This technique of apprising persons informally as to their rights and liabilities has been termed an excellent practice in administrative procedure.") (citation and internal quotation marks omitted). Courts have generally been reluctant to hold that such responses to public inquiries are immediately reviewable. See *O'Connor*, 747 F.2d at 753-754; see also *Holistic Candlers & Consumers Ass'n* v. *FDA*, 664 F.3d 940, 941-946 (D.C. Cir.) (canvassing cases), cert. denied, 133 S. Ct. 497 (2012); *Air Brake Sys., Inc.* v. *Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (Sutton, J.) (counsel letter requested by regulated party was not final agency action); pp. 33-35, *infra*.

To be sure, a party who disagrees with the agency's view might prefer to obtain a judicial determination of that party's rights and obligations immediately upon

learning of the agency's opinion. But where (as here) the agency's expression of its views does not affect the entity's legal obligations or increase the penalties to which it is potentially subject, the entity's disagreement with the agency does not in itself justify immediate judicial review. Cf. *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 811 (2003) (rejecting argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis" because "courts would soon be overwhelmed with requests for what essentially would be advisory opinions"). Courts have also recognized that agency informational efforts inure to the public's benefit, and that "[t]o permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue." *Shultz*, 443 F.2d at 699 (citation omitted).

That is not an abstract concern here. Significant agency resources are necessary to perform the scientific and technical analysis required to produce the tens of thousands of jurisdictional determinations requested annually. Allowing immediate judicial review of each of those determinations could impose a substantial further strain on the Corps' limited resources. Particularly because nothing in the Act or the Corps' regulations requires the Corps to issue jurisdictional determinations, the Corps might reconsider the practice, or at least revisit its willingness to provide an approved jurisdictional determination to anyone who requests it. See *Belle Co.* v. *United States Army Corps of Eng'rs*, 761 F.3d 383, 394 (5th Cir.

2014) (immediate judicial review would "disincentivize the Corps from providing [jurisdictional determinations]," thereby "undermin[ing] the system through which property owners can ascertain their rights and evaluate their options"), cert. denied *sub nom. Kent Recycling Servs., LLC* v. *United States Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015).

B. A Jurisdictional Determination Is Not "Final Agency Action" Because It Does Not Determine Legal Rights Or Obligations, Or Impose Legal Consequences

The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Two conditions must be met for agency action to be "final." *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-178 (citations and internal quotation marks omitted).

An approved jurisdictional determination for which administrative appeals have been completed may represent the consummation of the Corps' decisionmaking with respect to the presence of waters of the United States on particular property. The determination reflects the agency's official view, and it will remain in effect for five years unless conditions change or new information comes to light. See p. 5, *supra*; see also 33 C.F.R. 331.2, Pt. 331, App. C; RGL 05-02 ¶ 1. To be sure, if the recipient of an affirmative jurisdictional determination subsequently

discharges pollutants at the relevant site, the decision whether to initiate various types of enforcement proceedings might involve officials at other agencies (*e.g.*, EPA officials for an administrative compliance order, or Justice Department attorneys for a judicial-enforcement suit). Those officials might seek to confirm the presence of covered waters before commencing enforcement actions. But the issuance of an approved jurisdictional determination marks the culmination of the distinct process by which the Corps informs a landowner whether the Corps believes that covered waters are present on a specified tract.

The jurisdictional determination does not, however, satisfy *Bennett*'s second prong: it does not impose legal consequences or alter the recipient's legal obligations in any way. It does not contain any directives; it does not alter the landowner's exposure to penalties for violating the Act; and it does not change the standard of review that otherwise would govern any challenge to the agencies' final permitting or enforcement decisions. In holding to the contrary, the court of appeals conflated an affirmative jurisdictional determination's possible practical effect—namely, the increased incentive to obtain a permit—with the legal effects that this Court's decisions require.[6]

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[6] In so concluding, the court of appeals departed from decisions of the Fifth and Ninth Circuits. In *Belle*, the Fifth Circuit held that a jurisdictional determination is not final agency action, and that this Court's decision in *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), does not require a contrary conclusion. *Belle*, 761 F.3d at 393-394. The Ninth Circuit, in its pre-*Sackett* decision in *Fairbanks North Star Borough* v. *U.S. Army Corps of Engineers*, 543 F.3d 586 (2008), cert. denied, 557 U.S. 919 (2009), similarly held that a jurisdictional determination is not final. *Id.* at 589.

1. The CWA itself, not the jurisdictional determination, imposes legal obligations on respondents

An affirmative jurisdictional determination informs the landowner of the Corps' view that a particular property contains "waters of the United States" and is therefore subject to the CWA's ban on unauthorized pollutant discharges into those waters. 33 U.S.C. 1362(7); see 33 U.S.C. 1311(a). The determination addresses only the presence or absence of waters of the United States on the property. It does not announce any conclusion about whether the landowner's planned activities would require a permit, or whether the landowner's past activities, if any, have violated the Act. Nor does it direct the landowner to take (or refrain from taking) any action. See Pet. App. 46a-47a.

a. A jurisdictional determination does not alter a property owner's obligation, if any, to obtain a permit. If the property in fact contains waters of the United States, the CWA requires the landowner to obtain authorization under the Act and its implementing regulations before discharging pollutants into those waters, whether or not the landowner has requested or received a jurisdictional determination. 33 U.S.C. 1311(a), 1344; see 33 U.S.C. 1342 (2012 & Supp. II 2014); 33 C.F.R. 331.2. Conversely, if the property does not contain waters of the United States, but the Corps issues a jurisdictional determination that incorrectly finds covered waters to be present, pollutant discharges at the site remain lawful despite the Corps' expressed view.

A jurisdictional determination also does not address whether the property owner's planned activities would require a permit. See 33 C.F.R. 331.2 ("[Juris-

dictional determinations] do not include determinations that a particular activity requires a * * * permit."). Rather, an approved jurisdictional determination focuses exclusively on the conditions on the property and the scientific and legal evaluation necessary to ascertain the presence of waters of the United States. See, *e.g.*, Pet. App. 48a-102a. The Corps' statement of its conclusion that the property contains waters regulated by the CWA does not give rise to any necessary inference about the need for a permit, as some discharges into covered waters do not require a permit. See, *e.g.*, 33 U.S.C. 1344(f). The court of appeals was therefore incorrect in asserting that the jurisdictional determination "adversely affects [respondents'] right to use their property in conducting a lawful business activity." Pet. App. 13a.

Receiving a jurisdictional determination also does not affect the landowner's ability to obtain a permit. See 33 C.F.R. Pts. 320, 331 (describing criteria and procedures for granting permits without reference to whether a landowner has received a jurisdictional determination). A landowner may request a jurisdictional determination either before applying for a permit or during the permitting process. See RGL 08-02 ¶ 2. If the landowner seeks and receives a jurisdictional determination before applying for a permit, the Corps generally will not revisit CWA coverage as part of the permitting process except on the basis of new information. If the landowner applies for a permit without first obtaining a jurisdictional determination, and then places CWA coverage in issue during the permitting process, the Corps will issue a jurisdictional determination in response. Whichever way a landowner chooses to raise questions concerning CWA

coverage, the Corps will verify coverage through a jurisdictional determination. If the owner subsequently seeks, or continues to seek, a permit, the Corps will then consider whether, and on what conditions, the discharge should be authorized.[7]

After exhausting administrative remedies, the landowner may obtain judicial review of the permitting decision, including any predicate jurisdictional determination, if the permit is denied or the applicant declines a proffered permit. See *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006).

b. An affirmative jurisdictional determination does not expand or alter the range of enforcement mechanisms available to the agencies charged with administering the CWA.

Whether or not the Corps has previously issued a jurisdictional determination informing the landowner that a particular tract contains waters of the United States, the EPA may issue an administrative compliance order (of the sort at issue in *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012)), or it may institute an

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[7] When the Corps makes a permit decision, the permit applicant can then administratively appeal the permit denial or the declined permit to the Corps' division engineer. 33 C.F.R. Pt. 331. In such an appeal, the applicant can again argue that the relevant site does not contain waters of the United States, even if the applicant previously (and unsuccessfully) appealed the standalone jurisdictional determination. The division engineer, who decides the appeal, reviews the question of CWA coverage again. 33 C.F.R. 331.5(a)(2) ("The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved [jurisdictional determination] was appealed.").

administrative penalty proceeding and impose a penalty. 33 U.S.C. 1319(a) and (g). Such enforcement actions are necessarily predicated on the EPA's assessment that the CWA applies to the waters in question, see RGL 08-02 ¶ 4.e; but the fact that the Corps has previously expressed that view in a jurisdictional determination does not affect the landowner's rights in an administrative-enforcement proceeding, see 33 U.S.C. 1319(a) and (g); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 129-130 (1939). The landowner's exposure to administrative penalties likewise does not vary based on whether it has previously received an affirmative jurisdictional determination. 33 U.S.C. 1319(g)(2).

Both types of administrative action afford the landowner the opportunity to obtain judicial review of the agency's underlying conclusion that the property contains waters of the United States. See 33 U.S.C. 1319(g)(8) (providing for judicial review of administrative penalty decision); *Sackett*, 132 S. Ct. at 1371-1372 (compliance orders issued under 33 U.S.C. 1319(a) are reviewable under the APA); see also 5 U.S.C. 706(2)(A). In any such judicial-review proceedings, the EPA's coverage determination would be reviewed under the same arbitrary-and-capricious standard as the EPA's determination that the property owner had violated the CWA and that a particular penalty was appropriate. See 33 U.S.C. 1319(g)(8); see also, *e.g.*, *Kelly* v. *United States Envtl. Prot. Agency*, 203 F.3d 519, 523 (7th Cir. 2000). That standard of review would apply whether or not the Corps had issued an affirmative jurisdictional determination before the discharges occurred.

Alternatively, the United States may commence a judicial-enforcement action. In such an action, the United States bears the burden of establishing, *inter alia*, that the defendant's discharges occurred in waters of the United States. See 33 U.S.C. 1319(b); see also, *e.g.*, *United States* v. *Cundiff*, 555 F.3d 200, 213 (6th Cir.) (government "must prove that (1) a person (2) discharged a pollutant (3) from a point source (4) into waters of the United States (5) without a permit"), cert. denied, 558 U.S. 818 (2009). That standard of proof applies whether or not the Corps has previously issued a jurisdictional determination concerning the site at issue. See *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594-595 (9th Cir. 2008) ("[W]e would not give the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding."), cert. denied, 557 U.S. 919 (2009) (*Fairbanks*).

If the landowner is ultimately found liable in a judicial-enforcement proceeding, it will not face any increased exposure to penalties by virtue of the prior jurisdictional determination. Because a jurisdictional determination contains no directives that could be violated, receipt of a jurisdictional determination cannot trigger any sanctions for violating the determination itself. Nor does the jurisdictional determination alter the landowner's legal exposure to sanctions under the CWA. See 33 U.S.C. 1319(d) (setting maximum per-day penalty without regard to prior

receipt of a jurisdictional determination); 74 Fed. Reg. 627 (Jan. 7, 2009) (same).

The court of appeals was therefore incorrect in stating that a jurisdictional determination increases "the penalties [respondents] would risk if they chose to begin mining without a permit" by exposing the landowner to "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." Pet. App. 15a. The CWA does provide that a court, in assessing an appropriate civil penalty for a violation, should consider, *inter alia*, "any good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). The statute also imposes criminal penalties for knowing violations of the CWA, 33 U.S.C. 1319(c)(2). A landowner's receipt of a jurisdictional determination—and its consequent knowledge that the agency believes the CWA applies—could be offered as evidence of the owner's knowledge of the CWA's applicability. But the civil-penalty and criminal provisions do not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination. The possibility that a landowner's receipt of a jurisdictional determination might be given evidentiary weight in some future proceeding is therefore contingent—not the sort of concrete legal consequence necessary to render the action final. See *Fairbanks*, 543 F.3d at 594-595. In any event, the potential knowledge-conferring aspect of a jurisdictional determination does not distinguish it from any number of informal statements that agencies offer in order to assist regulated entities in structuring their activities—or, for that matter, a private consultant's report, which

likewise could be offered as evidence that a regulated party knew its conduct to be unlawful.

c. In its lack of legal effect, an affirmative jurisdictional determination is similar to informal agency opinion letters and other statements, often issued in response to inquiries from the public, communicating the agency's views about the proper application of relevant statutory provisions to particular factual scenarios. Courts have generally held that those actions are not "final" under the APA because they have "no direct, binding effect on [regulated parties] and * * * no legal consequences * * * by virtue of the deference courts might give to them." *Air Brake Sys.*, 357 F.3d at 644 (counsel letter requested by regulated party was not final); see, *e.g.*, *Holistic Candlers*, 664 F.3d at 941-942 (FDA warning letters expressing agency's view that entity must obtain FDA approval before selling product were not final because they did not compel any action); *Florida Power & Light Co.* v. *EPA*, 145 F.3d 1414, 1419 (D.C. Cir. 1998) (EPA letters and statement of EPA's understanding of its statutory authority were not final because they had no legal effect on regulated party); *USAA Fed. Sav. Bank* v. *McLaughlin*, 849 F.2d 1505, 1508-1510 (D.C. Cir. 1988) (letter stating extent of regulatory jurisdiction, in response to inquiry, was not reviewable); *O'Connor*, 747 F.2d at 755-757.

To be sure, the agency process that culminates in an approved jurisdictional determination is more formal and structured than is the case with many more ad hoc agency communications. See pp. 3-5, *supra*. That feature of the jurisdictional determination is relevant to *Bennett*'s first prong, since it suggests that the determination is the consummation of

the Corps' decisionmaking process with respect to CWA coverage of the relevant site. But to be subject to immediate review under the APA, the jurisdictional determination must also satisfy *Bennett*'s second prong—it must determine legal rights or impose legal consequences. See *Air Brake Sys.*, 357 F.3d at 641 ("To say that a legal interpretation is final because it is not subject to further review within the agency, however, is not to say that it is 'final' in the sense that [Section 704] of the APA requires it to be."). In that regard, a jurisdictional determination is no different from the innumerable opinions that agencies offer to assist regulated entities in understanding the obligations imposed by the governing statute.[8] See, *e.g.*,

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[8] The Corps' regulations state that a jurisdictional determination constitutes "a Corps final agency action." 33 C.F.R. 320.1(a)(6). That provision does not purport to address whether a jurisdictional determination is "final agency action" under the APA. Rather, it clarifies that, because the Corps has "authorized its district engineers"—as opposed to higher-ranking Corps officials—to issue jurisdictional determinations, "the public can rely on" a district engineer's "determination" as reflecting the Corps' official view on CWA coverage. 51 Fed. Reg. 41,207, 41,220 (Nov. 13, 1986). In a later rulemaking, the Corps confirmed that it did not regard jurisdictional determinations as "final" for purposes of judicial review, stating that in its view, a challenge to a jurisdictional determination would not be ripe "until a landowner who disagrees with a [jurisdictional determination] has gone through the permitting process." 65 Fed. Reg. 16,488 (Mar. 28, 2000). In any event, even if the Corps had characterized a jurisdictional determination as final for APA purposes, "[w]hether an administrative decision is final is determined not by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed." *Adenariwo* v. *Federal Mar. Comm'n*, No. 14-1044, 2015 WL 8744623, at *3 (D.C. Cir. Dec. 15, 2015) (citation and internal quotation marks omitted); *Ocean Cnty. Landfill Corp.* v.

Independent Equip. Dealers Ass'n v. *EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (EPA letter articulating legal interpretation represented consummation of agency decisionmaking process, but it was not final because it "was purely informational in nature; it imposed no obligations and denied no relief").

2. Although an affirmative jurisdictional determination may have a practical effect on the recipient's assessment of the advantages and disadvantages of alternative courses of conduct, it does not have the legal effect necessary for final agency action

a. In concluding that a jurisdictional determination satisfies *Bennett*'s second prong, the court of appeals conflated the potential practical effects of a jurisdictional determination with the altered legal obligations that are required under *Bennett*. Pet. App. 11a-13a. It is true that, as a practical matter, a landowner who receives an affirmative jurisdictional determination may have a greater incentive to seek a permit than someone who has not received such a determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys to the landowner about the agency's scientific and legal analysis and its ultimate view of the CWA's coverage. When an agency communication does not affect the legal obligations or sanctions to which the recipient is subject, that sort of practical effect is not sufficient to render the communication final agency action. See *National Ass'n of Home Builders* v. *Norton*, 415 F.3d 8, 14-15 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning

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United States Envtl. Prot. Agency, 631 F.3d 652, 655 (3d Cir. 2011) (same).

underlying statutory obligation is insufficient to establish legal consequences under *Bennett*).

Indeed, whenever an agency endeavors to provide the regulated public with more information regarding the agency's interpretation of a governing statute, a potential practical consequence of the agency's efforts is that some parties may feel constrained to conduct themselves in accordance with the agency's stated view despite their disagreement with it. Yet the courts have not traditionally viewed administrative efforts to inform the public about statutory requirements as coercive. See, *e.g.*, *National Ass'n of Home Builders*, 415 F.3d at 14-15; *Florida Power & Light Co.*, 145 F.3d at 1419. To the contrary, courts have understood such actions to be a "valuable public service" that enables private parties to make more informed decisions about their best course of action in light of statutory requirements. *O'Connor*, 747 F.2d at 754.

Jurisdictional determinations thus do not inhibit private choice; they facilitate it. When a property owner discharges pollutants into waters of the United States, its conduct violates the CWA unless the discharge either has been authorized, generally by a permit, or falls within a statutory or regulatory exemption. That is so whether or not the Corps has previously issued an affirmative jurisdictional determination or otherwise communicated its view that covered waters are present. An affirmative jurisdictional determination simply gives the property owner more information on which to base its own assessment of its statutory obligations.

That additional information may influence the landowner's choice among alternative courses of con-

duct. But to treat that possible influence as sufficient to render the jurisdictional determination immediately reviewable would depart from the longstanding judicial encouragement of administrative efforts to aid the public in understanding statutory requirements. Agency informational statements would serve no useful purpose if the persons who requested those statements gave them no weight in choosing among alternative courses of conduct. If that potential impact rendered such statements final agency action, the Corps—and other agencies with similar practices—would have to consider whether to continue "to devote the limited resources of [the] office to this work." *O'Connor*, 747 F.2d at 754.

b. This Court's precedents concerning administrative complaints reinforce the conclusion that any practical effect arising from a jurisdictional determination does not justify judicial review. Even when an agency action *requires* a party to participate in an agency proceeding, the resulting practical burden is not sufficient by itself to render the action final.

In *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), the Court held that an FTC complaint instituting an administrative hearing to determine whether the regulated party had violated the law was not final agency action. *Id.* at 239-240. The Court rejected the argument that the obligation to participate in the hearing was a legal consequence sufficient to render the action final. The Court explained that, although the "burden" of participating in the proceeding "certainly is substantial, it is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Id.* at 242; see, *e.g.*, *Aluminum Co. of Am.* v. *United States*, 790

F.2d 938, 941 (D.C. Cir. 1986) (Scalia, J.) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding."); see also *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 774 F.3d 25, 30 (D.C. Cir. 2014) (same). That is so even when the regulated party argues that the agency lacks statutory authority to conduct the proceeding at all. See *Aluminum Co.*, 790 F.2d at 942 ("Nor does the claim that assumption of original jurisdiction is beyond the [Interstate Commerce Commission's] statutory authority make any difference."). If an agency assertion of statutory authority that requires a regulated party to shoulder the potentially "substantial" practical burden of participating in an agency proceeding does not impose legal consequences, it follows a fortiori that an affirmative jurisdictional determination, which may encourage permit applications but does not require the recipient to do anything, is not final.

c. The contrast between this case and *Bennett* is instructive. In *Bennett*, the Court considered a "[b]iological [o]pinion" that was prepared by one federal agency (the Fish and Wildlife Service (Service)) and that authorized another agency (the "action agency") to "take" endangered species "if (but only if) [the action agency] complie[d] with" terms and conditions prescribed in the biological opinion. 520 U.S. at 178. The biological opinion thus had the practical effect of "a permit authorizing the action agency to 'take' the endangered or threatened species," notwithstanding the general prohibition on taking such species imposed by the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, so long as the action agency abided by the specified terms and conditions. 520 U.S.

at 170. The Court held that the biological opinion was "final agency action" because it "alter[ed] the legal regime" by establishing the conditions upon which the action agency could lawfully "take" endangered species. *Id.* at 178.

The biological opinion in *Bennett* was found to be "final agency action" because its terms and conditions actually established the line of demarcation between lawful and unlawful action-agency conduct. Unlike a Corps jurisdictional determination, the biological opinion did not simply provide the Service's view as to what conduct the relevant statute independently allowed or prohibited. Rather, under the pertinent ESA provisions, the actual legality of any takings of endangered species that might occur during the relevant action-agency project turned on whether the action agency had complied with the terms and conditions set forth in the biological opinion. See 520 U.S. at 170 (explaining that, under the ESA provisions that address inter-agency consultation, "[a]ny taking that is in compliance with these terms and conditions 'shall not be considered to be a prohibited taking of the species concerned'") (quoting 16 U.S.C. 1536(*o*)(2)). By legitimizing takings that would otherwise have been unlawful, the Service's biological opinion had an operative legal effect that the Corps' jurisdictional determinations lack.

The Court in *Bennett* described the Service's biological opinion as "a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions.'" 520 U.S. at 170. As that language suggests, the biological opinion at issue in *Bennett* is more persuasively analogized to a CWA discharge permit than

to a Corps jurisdictional determination. If a CWA permit applicant believes that the permit conditions fashioned by the Corps are unreasonably onerous, it may file suit (after exhausting administrative remedies) under the APA. Unlike a jurisdictional determination, a CWA permit does not simply express the Corps' *opinion* about the proper application of some other legal rule. Rather, a CWA permit is "final agency action" because the *actual legality* of pollutant discharges depends on whether the permittee has complied with its terms. See 33 U.S.C. 1311(a), 1344(p). Because "[c]ompliance with a permit issued" by the Corps under Section 1344 "shall be deemed compliance * * * with," *inter alia*, Section 1311's restrictions on pollutant discharges, 33 U.S.C. 1344(p), the effect of a Corps permit is to *render lawful* conduct that the Act would otherwise prohibit.

Just as an affirmative jurisdictional determination does not impose any independent legal barrier to pollutant discharges, a negative jurisdictional determination does not have the legal effect of a permit issued by the Corps pursuant to 33 U.S.C. 1344. If a particular site in fact contains waters of the United States, but the Corps incorrectly concludes that it does not, unpermitted pollutant discharges into those waters remain unlawful (assuming that no exception to the statutory prohibition applies), even if the Corps' view is reflected in an approved jurisdictional determination. To be sure, the general practice of the federal agencies that enforce the CWA has been to refrain from commencing enforcement actions under these circumstances while a negative jurisdictional determination remains in effect. Unlike a CWA permit, however, a negative jurisdictional determination

does not cause otherwise-unlawful discharges to be lawful, and it does not insulate the landowner from potential liability in a citizen suit brought by an aggrieved private plaintiff. See 33 U.S.C. 1365(a)(1) and (f).

d. The other decisions on which the court of appeals relied (Pet. App. 11a-13a) are likewise distinguishable. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Court held that regulations setting forth prescription-drug-labeling requirements were final because they "ha[d] the status of law and violations of them carry heavy criminal and civil sanctions." *Id.* at 152. Similarly, the agency regulations at issue in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), had the "force of law" because they "require[d] [the Federal Communications Commission] to reject and authorize[d] it to cancel licenses on the grounds specified in the regulations without more." *Id.* at 418. And in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), the Court held that a generally-applicable order determining which commodities fell within a statutory "agricultural" exemption to a permitting requirement was final because the order established the generally-applicable rule that the agency would apply in determining whether the statute had been violated. *Id.* at 41-45. The court below cited no case in which this Court has treated as "final agency action" an agency communication like this one, which simply states the agency's non-binding view about the proper application of a pre-existing legal standard to a particular factual setting.

3. Sackett *does not suggest that a Corps jurisdictional determination is final agency action*

The court of appeals construed this Court's decision in *Sackett* as supporting the conclusion that a jurisdictional determination is immediately reviewable. The court of appeals' reliance on *Sackett* was misplaced. In holding that the EPA compliance order at issue in *Sackett* was final agency action, the Court did not rely on the pragmatic incentives that the Sacketts likely experienced when they were notified of the agency's allegations that their property contained covered waters and that they had violated the CWA. Rather, the Court found dispositive the fact that the compliance order materially increased both the landowners' legal obligations and the penalties to which they were potentially subject. 132 S. Ct. at 1371-1372. A jurisdictional determination does not have any similar legal effect.

The CWA provides that, when the EPA finds "that any person is in violation of" enumerated provisions of the Act, the agency may "issue an [administrative compliance] order requiring such person to comply with such section or requirement." 33 U.S.C. 1319(a)(3). A compliance order is thus a component of the CWA's enforcement framework, designed to "obtain quick remediation" of a CWA violation found by the agency. *Sackett*, 132 S. Ct. at 1374. As such, a compliance order directs the recipient to bring itself into compliance, and it exposes the recipient to additional penalties—beyond those that may be imposed for the statutory violation itself—if the recipient does not comply with the order. *Id.* at 1371-1372.

The *Sackett* Court relied on those aspects of the compliance order in holding that the order was "final

agency action." The Court explained that the order imposed a "legal obligation" on the Sacketts to "'restore' their property according to an agency-approved Restoration Work Plan," and to give the EPA access to their property and relevant documentation. 132 S. Ct. at 1371 (citation omitted). Those obligations arose "[b]y reason of the [compliance] order," not as a result of the CWA itself. *Ibid.* The *Sackett* Court further concluded that "'legal consequences flow' from issuance of the [compliance] order" because a landowner can be liable for penalties for violating the compliance order, in addition to penalties for violating the Act. *Ibid.* (quoting *Bennett*, 520 U.S. at 178) (citation and internal quotation marks omitted). The compliance order also "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" under Corps regulations that restrict the availability of permits for activities that are the subject of such an order. *Id.* at 1372.

A jurisdictional determination possesses none of the characteristics that were dispositive in *Sackett*. It is not a statutory enforcement tool through which the agency directs the recipient to alter its conduct. A jurisdictional determination is instead an agency creation, designed to assist regulated entities who seek the agency's opinion. It does not express any view about the lawfulness of the recipient's proposed activities, much less find a violation of the statute, and it does not instruct the recipient to take any action whatsoever. If the recipient of an affirmative jurisdictional determination later discharges fill at the relevant site and is ultimately found to have violated the CWA, its prior receipt of the jurisdictional determination does not expose it to any additional penalties beyond those

that the CWA establishes for violating the statute. 33 U.S.C. 1319(d). A jurisdictional determination also has no impact on the recipient's ability to seek and obtain a permit, since the regulations limiting permits following a compliance order do not accord the same effect to jurisdictional determinations. See 33 C.F.R. 326.3(e)(1)(iv).

The Court in *Sackett* also expressed concern that immediate judicial review of the compliance order was necessary to prevent "the strong-arming of regulated parties." 132 S. Ct. at 1374. That concern arose largely from the fact that the compliance order exposed the recipient to double the statutory penalties for each day the asserted violation persisted—yet, absent immediate review, the EPA would retain sole control over the timing of a judicial-enforcement action. *Id.* at 1372; *id.* at 1375 (Alito, J., concurring). A jurisdictional determination raises no comparable concerns. A recipient of a jurisdictional determination has the same legal and practical options the day it receives the determination as it had the day before; it simply has additional information to assist it in choosing among those options. Because jurisdictional determinations (unlike EPA compliance orders) do not direct the recipient to take or refrain from taking any action, and because they are typically provided only to persons who request them, they are not easily used to "strong-arm[]" regulated parties. *Id.* at 1374.

C. There Are Adequate Alternative Opportunities For Respondents To Obtain Judicial Resolution Of The Issue Of CWA Coverage

Even if a jurisdictional determination satisfied *Bennett*'s two-part test for identifying "final agency action," APA review would be available only if there is

"no other adequate [judicial] remedy." 5 U.S.C. 704. Contrary to the court of appeals' conclusion, Pet. App. 13a-16a, respondents possess adequate alternative opportunities to argue in court that their property does not contain CWA-protected waters.

1. The CWA contemplates that the permitting process will provide the primary avenue of obtaining judicial review of a jurisdictional determination.[9] The CWA establishes a comprehensive permit system that provides a "means of achieving and enforcing" the Act's discharge limitations. *EPA* v. *California*, 426 U.S. 200, 205 (1976). The Act is therefore designed to encourage regulated parties to seek permits, and to obtain judicial review of permitting decisions if they are dissatisfied with the disposition of their permit applications, before they discharge pollutants.

When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, and may argue in court that any waters on its property are not covered by the Act. See 33 U.S.C. 1344(a); 33 C.F.R. 331.10, 331.12; see also *Precon Dev. Corp.* v. *United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011). Many parties have obtained judicial review of a CWA coverage issue through that

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[9] In *Sackett*, the Court concluded that the Corps' permitting process did not provide an adequate means of seeking review of an EPA compliance order. That holding, however, was based on a circumstance not present here. Because the EPA had issued the compliance order, the Court stated that judicial review of the Corps' permitting decision would not "provide an 'adequate remedy' for action already taken by another agency." 132 S. Ct. at 1372. Here, the Corps "issued the [jurisdictional determination], so it is not the case that the only alternative remedy is one provided by a different agency." *Belle*, 761 F.3d at 394 n.4.

route. See, *e.g.*, *Carabell*, 391 F.3d at 706-707. And if the Corps grants a permit on conditions that satisfy the applicant, judicial review of the threshold jurisdictional determination is unnecessary.

The court of appeals held that the permitting process is inadequate because it is "prohibitively expensive" and time-consuming. Pet. App. 14a. That reasoning ignores the statutory framework that Congress established. The CWA itself contains no reference to standalone jurisdictional determinations. Rather, Congress contemplated that the Corps would ordinarily determine CWA coverage as part of the permitting process, and that the property owner would obtain any necessary judicial review of that determination at the conclusion of that process. Having "considered the costs" of the permitting system, Congress evidently determined that the permitting process would provide an adequate avenue for obtaining review of the Corps' coverage determination as well as its decision on the permit. *West Va. Highlands Conservancy, Inc.* v. *Huffman*, 625 F.3d 159, 170 (4th Cir. 2010) (explaining that Congress decided, after weighing costs and benefits, that "a permitting scheme is the crucial instrument for protecting natural resources"). In finding the permitting process to be an inadequate avenue of judicial review, based solely on its own view that the attendant costs make that approach infeasible, the court of appeals improperly second-guessed Congress's conclusions.

In any event, the court of appeals misperceived the burden of seeking a permit. The court relied on the statement in the plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006), that "the average applicant for an individual Corps permit 'spends 788

days and $271,596 in completing the process.'" Pet. App. 14a (citation omitted); see *Rapanos*, 547 U.S. at 721 (plurality opinion). Those figures originated in a 2002 article that examined 103 individual- and general-permit applications. See David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 73-74 (Sunding). For several reasons, the court of appeals' reliance on the Sunding figures was misplaced.

As an initial matter, individual permits are the exception, not the rule, especially for the smaller projects likely to be undertaken by individuals or small businesses. See pp. 6-7, *supra*. The Corps resolves the vast majority of permit applications—between 90% and 95% every year—by verifying that the proposed discharge falls within the scope of an existing general permit. Corps, Inst. for Water Res., *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources* 25 (Oct. 2015), http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf (*Retrospective*).

The general-permitting process is streamlined and requires significantly less of the applicant than the individual-permitting process. In 2015, for instance, the Corps reported that it issued 86% of general-permit verifications within 60 days after receiving a completed application.[10] *Regulatory*; cf. 77 Fed. Reg.

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[10] The Sunding article asserted that the average general-permit verification is granted in 313 days, but that figure included the time the applicant takes to prepare the application for submission and to complete it after submission. Sunding 75. The Sunding

at 10,268 (in 2010, average processing time was 32 days). And because general-permit applications typically contemplate a smaller impact and do not require the applicant to analyze alternate plans, the application process is less expensive than for an individual permit. While reliable and representative cost data are difficult to obtain—applicants do not report their costs to the agency, and costs will necessarily vary based on the nature of the project and choices made by the applicant—the Corps estimated in 2001 that the average applicant spent $3000 to $10,000 to obtain a general-permit verification. Corps, Inst. for Water Res., *Cost Analysis for the 2000 Issuance and Modification of Nationwide Permits* 14 (Aug. 2001) (*Cost Analysis*).[11] The Sunding article asserted, based on a sample of fewer than 100 general-permit applications (out of the tens of thousands each year), that the average cost of verifying the coverage of a general permit for that set was $28,915. Sunding 74.

With respect to the individual-permit data on which the court of appeals relied, there is reason to doubt that it is representative of the broad range of individual-permit applications. The Sunding article does not set forth the raw data on which its estimates were based, but it appears to have been drawn from

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article asserted that the Corps processes general-permit verifications within 16 days after receiving a completed application. *Ibid.*

[11] That estimate pertains to permit applications that affect three or fewer acres of waters of the United States, and it was "obtained through informal interviews with wetland permitting consultants and Corps district regulatory staff based around the country." *Cost Analysis* 13; see *id.* at 14. The overwhelming majority of general permits authorize activities that involve three or fewer acres of impacted waters. See, *e.g.*, *Retrospective* 35.

examples nominated by the regulated community, and to have included large projects, including public-works projects undertaken by public entities, that would have entailed more extensive analyses and therefore greater costs.[12] Sunding 73. The Corps' own 2001 study, which excluded projects affecting more than three acres, found that the average applicant for an individual permit spent $12,000 to $24,000 in fiscal year 1998, and that an average of 89 days elapsed between the Corps' receipt of a completed permit application and its issuance of a decision. *Cost Analysis* 14 & 15 n.6. The wide variance between the Corps' estimates and the Sunding estimates reflects the fact that individual-permitting costs vary widely based on the circumstances of the project. It also suggests the difficulty of drawing reliable inferences from cost estimates based on fewer than 100 permit applications out of the thousands filed annually.[13] In view of that uncertainty, it was particularly inappropriate for the court of appeals to rely on a single article's cost figures to discount the adequacy of the

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[12] The article stated that the median cost of seeking an individual permit ($155,000) was much lower than the average cost ($271,596), indicating that the largest projects were driving up the average. Sunding 74 & n.67.

[13] Considering "average" permitting costs in the abstract ignores important information—not only the extent and gravity of the projected impact on waters of the United States, but also the cost of the permit relative to the cost and scope of the project. A large project with a greater environmental impact will naturally give rise to higher CWA permitting costs, just as it may result in higher state and municipal building- or zoning-permit costs. When a project is itself large-scale, even a permitting cost that appears large in a vacuum may be a relatively minor portion of the overall planned expenditure.

permitting process that Congress has established as a means of obtaining judicial review.

2. A recipient of an affirmative jurisdictional determination who elects to proceed with discharges may also obtain judicial review of the CWA coverage issue if the government brings an enforcement proceeding or an aggrieved private plaintiff commences a citizen suit. If EPA assesses an administrative penalty, 33 U.S.C. 1319(g), or issues a compliance order, 33 U.S.C. 1319(a), those actions are immediately reviewable. See pp. 9-10, *supra*. The United States could also initiate a judicial-enforcement action, in which it would bear the burden of proving by a preponderance of the evidence that the property contains covered waters. 33 U.S.C. 1319(b). An aggrieved citizen likewise could file suit to allege that the landowner's discharges violated the CWA, see 33 U.S.C. 1365(a)(1) and (f), and the citizen plaintiff would bear the burden of proof on the coverage issue.

A landowner who discharges dredged or fill material without a permit may face monetary penalties if a court ultimately concludes that the discharges occurred into covered waters. 33 U.S.C. 1319(d). It is therefore understandable that persons in respondents' position would prefer a pre-permit, pre-discharge judicial ruling on the CWA coverage issue. Neither the CWA nor the applicable agency regulations, however, require the Corps to issue jurisdictional determinations, either in general or in any particular case. If respondents had not received a jurisdictional determination, they could have obtained a judicial ruling on the coverage question only through the routes described above, *i.e.*, by applying for a permit and then seeking judicial review of the Corps' decision on

that application, or by contesting the CWA's applicability in opposing any enforcement action. The fact that respondents voluntarily requested and received a jurisdictional determination does not make those avenues of review any less "adequate" than they would otherwise be.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

2. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

3. 33 U.S.C. 1319 provides in pertinent part:

Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with

such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

* * * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of

this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Ad-

ministrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, ,[1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

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[1] So in original.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph

shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any

provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

* * * * *

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

* * * * *

4. 33 U.S.C. 1344 provides in pertinent part:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * *

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and

(B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having

as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

* * * * *

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

* * * * *

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall

be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider

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[1] So in original. Probably should be "action"

the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

* * * * *

5. 33 U.S.C. 1365 provides in pertinent part:

Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district shall have jurisdiction, without regard to the amount courts in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * * * *

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.[1]

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[1] So in original.

6. 33 C.F.R. 320.1(a)(6) provides:

Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.*

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

7. 33 C.F.R. 330.1 provides:

Purpose and policy.

(a) *Purpose.* This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with

little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact auth-

orization under an NWP, if all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

* * * * *

(e) *Notifications.* (1) In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 45-day period. The 45-day period starts on the date of receipt of the notification in the Corps district office and ends 45 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 45-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 45-day period unless otherwise notified by the DE. If the DE fails to act within the 45-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

(2) The DE will review the notification and may add activity-specific conditions to ensure that the ac-

tivity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.

* * * * *

(f) *Individual Applications.* DEs should review all incoming applications for individual permits for possible eligibility under regional general permits or NWPs. If the activity complies with the terms and conditions of one or more NWP, he should verify the authorization and so notify the applicant. If the DE determines that the activity could comply after reasonable project modifications and/or activity-specific conditions, he should notify the applicant of such modifications and conditions. If such modifications and conditions are accepted by the applicant, verbally or in writing, the DE will verify the authorization with the modifications and conditions in accordance with 33 CFR 330.6(a). However, the DE will proceed with processing the application as an individual permit and take the appropriate action within 15 calendar days of receipt, in accordance with 33 CFR 325.2(a)(2), unless the applicant indicates that he will accept the modifications or conditions.

(g) *Authority.* NWPs can be issued to satisfy the permit requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, section 103 of the Marine Protection, Research, and Sanctuaries Act, or some combination thereof.

The applicable authority will be indicated at the end of each NWP NWPs and their conditions previously published at 33 CFR 330.5 and 330.6 will remain in effect until they expire or are modified or revoked in accordance with the procedures of this part.

8. 33 C.F.R. 331.2 provides in pertinent part:

Definitions.

* * * * *

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

* * * * *

Declined permit means a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and special conditions therein. A declined permit can also be an individual permit that the applicant originally accepted, but where such permit was subsequently modified by the district engineer, pursuant to 33 CFR 325.7, in such a manner that the resulting permit contains terms and special conditions that lead the applicant to decline the modified permit,

provided that the applicant has not started work in waters of the United States authorized by such permit. Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit.

* * * * *

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either pre-

liminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

* * * * *

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

* * * * *

9. 33 C.F.R. 331.5(a) provides:

Criteria.

(a) *Criteria for appeal*—(1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at § 331.2) to the appropriate division office in order to appeal an approved JD, a permit denial, or a declined permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of an approved JD, a permit denial, or a declined permit must be specifically stated in the RFA and must be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: A procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR part 230); or use of incorrect data. The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved JD was appealed.

Supreme Court, U.S.
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No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

THE PARTIES

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations and no publicly held company owns 10% or more of the stock.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. at 1a-21a), is reported at 782 F.3d 994. The opinion of the district court (Pet. App. at 22a-43a), is reported at 963 F. Supp. 2d 868.

JURISDICTION

The court of appeals entered its judgment on April 10, 2015. The court of appeals denied the United States Army Corps of Engineers' petition for rehearing on July 7, 2015 (Pet. App.103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Legal Background

The Clean Water Act authorizes the Corps of Engineers to regulate certain discharges to "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a) & 1362(7). The term "navigable waters" has been variously defined by the Corps over the years, but this Court redefined the term most recently in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the plurality defined "navigable waters" as Traditional Navigable Waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to Traditional Navigable Waters. *Id.* at 739-42. In a concurring opinion, Justice Kennedy opined that the Clean Water Act covered wetlands with a significant physical, biological, and chemical impact on Traditional Navigable Waters. *Id.* at 779. The Eighth Circuit has held the Corps can establish federal jurisdiction over wetlands under either the plurality's

"continuous surface water" test or Justice Kennedy's "significant nexus" test. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). In this case, the Corps relied on the "significant nexus" test.

The Clean Water Act is unique; it requires an expert "to determine if [it] even appl[ies] to you and your property." Pet. App. at 20a (Kelly, J., concurring). This is because the "reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by [federal] employees as wetlands covered by the Act " *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). Since the inception of the Act in 1972, "[t]he Corps has [] asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S. at 722. This implicates "the entire land area of the United States." *Id.* "Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id.*

To provide some clarity to agency officials and the regulated public for this expansive assertion of jurisdiction, that Congress did not intend and could not have foreseen, the "Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6). A formal Approved Jurisdictional Determination, or JD, provides a site-specific delineation of wetlands or other waters subject

to regulation under the Clean Water Act, along with detailed physical, chemical, and biological data in support of the determination. 33 C.F.R. § 331.2. The regulations themselves declare a "determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). The regulations also provide for Preliminary JD's that are written indications that there may be "waters of the United States" on a parcel. 33 C.F.R. § 331.2. But the Corps states these JD's are only "advisory in nature and may not be appealed." Pet. Opening Brief at 25(a).

The Corps not only interprets jurisdictional "waters of the United States" expansively, the Corps interprets jurisdictional waters inconsistently. This is confirmed by a report from the General Accounting Office (GAO) cited by this Court in *Rapanos*, 547 U.S. at 725. The report documents the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004). This is because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citation omitted).

In its effect, a Jurisdictional Determination requires property owners to: (1) abandon all use of the regulated portion of the land (often at ruinous cost); (2) seek a potentially unnecessary permit (often at

ruinous cost)[1]; or, (3) proceed with an otherwise lawful use of the land (risking ruinous fines[2] and imprisonment).

Corps regulations authorize an administrative appeal of an Approved JD. The procedure for this appeal is the same for an appeal of a permit denial or a permit that is declined by the applicant. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331.").

An action brought in the federal courts is subject to the requirements of the Administrative Procedure Act (APA). The APA states "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The general test for determining final agency action is often described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Finally, the agency action must be

---

[1] According to this Court, the "average applicant for an individual permit [as in this case] spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide [more general] permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 719.

[2] The Clean Water Act authorizes fines up to $37,500 a day. Pet. Opening Brief at 9 n.4.

one for which there is no other remedy in court other than APA review.

This case involves a challenge to a formal Approved Jurisdictional Determination issued by the Corps after an administrative appeal. Respondent Hawkes argues the JD is invalid (as determined by a Corps Review officer) and the project site is not subject to the Clean Water Act under any relevant standard. The Corps defends its JD on the basis the determination is not final agency action under *Bennett* and Respondent Hawkes has an adequate remedy in court; Hawkes can seek a permit, then decline the permit and seek redress in court for the contested Jurisdictional Determination. Or, if the permit is denied, Hawkes can challenge the need for a permit in court. In other words, Hawkes must go through the costly and time-consuming permit process before a court can determine whether Hawkes was required to go through the costly and time-consuming permit process in the first instance.

The Eighth Circuit Decision

The trial court dismissed the challenge to the Jurisdictional Determination on a 12(b)(6) motion for lack of subject matter jurisdiction under the APA, However, the Eighth Circuit Court of Appeals held formal Approved Jurisdictional Determinations represent final agency action subject to immediate judicial review. According to the Eighth Circuit, the Jurisdictional Determination is conclusive as to federal jurisdiction under *Sackett* and Hawkes has no other adequate remedy in court:

> The Corps's assertion that the Revised JD is merely advisory and has no more effect than

> an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD is a final agency action and the issue is ripe for judicial review under the APA.

Pet. App. at 16a-17a.

The court determined the test for APA finality is based on "practical considerations" and the Corps grossly understated the impact of a JD by "exaggerating the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action," like the JD in this case. The Eighth Circuit found "[n]umerous Supreme Court precedents confirm that this is not a basis on which to determine whether 'rights or obligations have been determined' or that 'legal consequences will flow' from agency action." *Id.* at 11a.

In her concurring opinion, Judge Kelly added:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

Pet. App. at 20a-21a.

The judgment of the Eighth Circuit conflicts with *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014) (aka *Kent Recycling* now pending on petition in this Court, 14-493), and *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008). This Court granted certiorari to resolve this conflict.

STATEMENT OF FACTS

The Property

The property at issue (the Property) is located in New Maine Township, Marshal County, Minnesota, and contains organic peat[3] found in wetland environments. JA at 13. In Minnesota, peat harvesting requires wetland replacement and restoration and is regulated under permits issued by the Minnesota Department of Natural Resources (MDNR). *Id.* The Property lies over 120 river miles from the nearest Traditional Navigable Water, the Red River of the North. *Id.* There is no continuous surface water connection between wetlands on the Property and a "water of the United States." *Id.* A farm, a separate, shallow ditch dug for farming purposes in an area the Corps concedes is upland at the border of the farm most distant from the Property, and another sizable upland area, are all located between the Property and the area the Corps claims is a "Relatively Permanent Water." *Id.* at 13-14.

Administrative Proceedings

In October, 2006, Hawkes obtained an option to purchase the Property, subject to receiving approval to conduct peat harvesting operations on the Property. *Id.* at 14. On March 20, 2007, Kevin Pierce, a Hawkes officer, met with representatives of the Corps and the Minnesota Department of Natural Resources. *Id.* The discussion at this meeting focused on potential

---

[3] Peat is a "brown, soil-like material characteristic of boggy, acid ground, consisting of partly decomposed vegetable matter. It is widely cut and dried for use in gardening and as fuel[.]" *See* http://www.oxforddictionaries.com/us/definition/american_english/peat.

roadblocks to the plan to harvest peat on the Property, including discussion of the Property's status as a rich fen and a wetland. *Id.* at 14-15.

On January 15, 2008, Mr. Pierce again met with representatives of the Corps and the MDNR to review plans to conduct peat harvesting on the Property. *Id.* at 15. At this meeting, Mr. Pierce discussed with the Corps and MDNR representatives the high quality of the peat available at the Property and the importance to Hawkes' business of being able to harvest peat on the Property. *Id.* As Mr. Pierce explained, the peat available to Hawkes, as of January, 2008, provided the company approximately seven to ten years of future operations. *Id.* Mr. Pierce also explained that by expanding peat harvesting to the Property, Hawkes could extend the lifespan of its business by ten to fifteen additional years. *Id.*

On or about December 13, 2010, Hawkes applied for an individual permit from the Corps under Section 404 of the Clean Water Act to expand its existing peat harvesting operations to a portion of the Property—approximately 150 acres. *Id.* As part of its permit application, Hawkes identified fifteen sites that it had evaluated as potential alternatives to the Property. None of those sites provided a viable alternative to peat harvesting on the Property. *Id.*

In January, 2011, Mr. Pierce again met with the Corps and MDNR. *Id.* At that meeting, Corps representatives spent the majority of time attempting to persuade Mr. Pierce to abandon his plans to use the Property. *Id.* Corps representatives played up the cost associated with the permitting process; arguing there was no guarantee that a permit would ever be granted; and suggesting that, even if a permit were to be

granted, the process would take many years before it would be completed. *Id.* at 15-16. But Mr. Pierce stated his intent to proceed. *Id.*

On or about March 15, 2011, the Corps issued a letter to Hawkes stating the Corps had made a "preliminary determination" that the Property is a "water of the United States" and "is regulated by the Corps under Section 404 of the Clean Water Act." *Id.* at 16. The Corps' letter also stated that "at a minimum" an environmental assessment will be required. *Id.* Mr. Pierce again met with representatives of the Corps and the MDNR on April 23, 2011. *Id.* At that meeting, one of the Corps representatives, Tamara Cameron, stated the opinion that the Property would be completely and permanently destroyed if peat were to be harvested on the Property. *Id.* Ms. Cameron also stated it could take years before a permit would be granted and the process would be very costly. *Id.*

On May 31 through June 3, 2011, representatives of the Corps conducted a site visit of the Property. *Id.* At that time, a Hawkes employee told Steve Eggers, from the Corps, how important expanding operations to the Property was to Hawkes' ability to continue its business and how much he hoped that Hawkes would be able to begin harvesting soon. *Id.* In response, Mr. Eggers suggested the employee should start looking for another job, or words to that effect. *Id.*

On or about August 25, 2011, the Corps sent another letter to Hawkes with a list of nine additional information items that would be needed for the permit application. *Id.* at 17. These included hydrological assessments of the wetland and of groundwater flow spatially and vertically, functional resource assessments including vegetation surveys,

inventorying and analyzing the quality of wetlands in the entire watershed, evaluation of *upstream* potential impacts, and more. *Id.* The cost of performing all of these requirements is estimated to exceed $100,000. *Id.*

Faced with these overly burdensome demands by the Corps, Hawkes put its permit application on hold and asked the Corps to justify its preliminary Jurisdictional Determination. *Id.* On November 1, 2011, representatives of the Corps met with the then owner of the Property. *Id.* Although Mr. Pierce had asked to be present in any meeting between the Corps and the landowner, the Corps chose to exclude him from this meeting. *Id.* At the meeting, the Corps representatives stressed to the landowner the harm that would result if peat harvesting were to be permitted on the Property and insisted the landowner try to sell the Property to a wetlands bank or to another party. *Id.* The Corps made these statements even though the Corps representatives were aware Mr. Pierce had obtained an option to purchase the Property. *Id.* The Corps also indicated there is a very good possibility that a full Environmental Impact Statement would be required for the project that would delay issuance of any permit for several years. *Id.* at 17-18.

On November 8, 2011, the Corps provided Hawkes with a copy of a draft Jurisdictional Determination for the Property. *Id.* at 18. The draft JD claimed the Property was connected by a Relatively Permanent Water through a series of culverts and unnamed streams which flowed into the Middle River and then to a Traditional Navigable Water (the Red River of the North) 120 miles away. *Id.* The Corps, therefore,

deemed the Property subject to Corps' jurisdiction under the Clean Water Act. The draft JD did not determine whether there was a significant nexus between the Property and any navigable waters. *Id.*

On December 1, 2011, Corps representatives conducted a site visit of the Property for the purpose of making a formal Approved Jurisdictional Determination. *Id.* By correspondence dated December 19, 2011, Hawkes, through their wetland consultant, identified numerous errors in the draft JD and provided the Corps with additional information to be considered in connection with its formal site investigation. *Id.* This information showed there was no Relatively Permanent Water that connected the Property to a Traditional Navigable Water. *Id.*

On or about February 7, 2012, the Corps issued a formal Approved Jurisdictional Determination (the "Initial JD"), concluding there was a "significant nexus" between the Property and the Red River of the North and, accordingly, the Property was a "water of the United States" subject to Corps' jurisdiction. *Id.* On or about April 4, 2012, Hawkes filed a timely appeal of the JD under 33 C.F.R. § 331.6 setting forth the reasons why the Property is not a "water of the United States." *Id.* at 18-19.

On or about April 23, 2012, the Regulatory Appeals Review Officer sent Hawkes' consultant a letter stating the appeal was appropriate for consideration. *Id.* at 19. The parties presented their oral arguments before the Review Officer on July 24, 2012, and an Administrative Appeal Decision was issued on October 24, 2012, finding the appeal had merit and the administrative record "[did] not contain sufficient documentation/analysis to support a finding

of Clean Water Act jurisdiction." *Id.* The Administrative Appeal Decision noted, among other things:

> • "The [Administrative Record] does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date [sic] given to support the finding." (footnote omitted)
>
> • "While the [Administrative Record] provides information indicating an OHW [i.e., "ordinary high water"] mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [Traditional Navigable Water]." (footnote omitted)
>
> • "The [Administrative Record] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW However, the water flow regime information was not sufficient to indicate that a significant nexus exists." (footnote omitted)

Id. at 19-20.

Following remand, on or about December 31, 2012, the Corps issued a revised JD (the "Revised JD") and advised that the Revised JD is a "final Corps permit [sic] decision in accordance with 33 C.F.R. § 331.10."

Id. at 20. According to 33 C.F.R. § 331.21, Plaintiffs are considered to have exhausted their administrative remedies when a final decision is made pursuant to 33 C.F.R. § 331.10. JA at 20.

The Revised JD did not contain additional data that would support a significant nexus between the Property and the Red River of the North. *Id.* However, the Revised JD still purportedly relies on Justice Kennedy's "significant nexus" test to assert jurisdiction over the Property, which is described by the Revised JD as a "Non-Relatively Permanent [Water] that flow[s] directly or indirectly into [a] Traditional Navigable [Water]." *Id.*

The Revised JD did not correct the deficiencies of the Initial JD that would demonstrate how the Property, either quantitatively or qualitatively, significantly affects the physical, biological, and chemical integrity of the Red River of the North located 120 river miles from the Property. *Id.* at 20-21. Even though the Corps had two years to establish jurisdiction, its Revised JD, like the Initial JD, speaks only to the overall functions provided by wetlands and stream headwaters in general. *Id.* at 21. As the Review Officer found, it does "not speak to how the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical or biological integrity of the downstream TNW." *Id.*

Any further efforts to obtain a permit to conduct peat harvesting on the Property would be futile, either because the Corps has already decided that it will not issue a permit or because the delay and expense of finally obtaining a permit would substantially impede,

if not prevent, Hawkes from proceeding with its plans to harvest peat on the Property. *Id.*

SUMMARY OF THE ARGUMENT

This case arises from a challenge to a formal Approved Jurisdictional Determination, or wetlands delineation, issued by the U.S. Army Corps of Engineers concluding peat bogs found on Respondents' property are subject to the Clean Water Act because the Property has a purported "significant nexus" with downstream "navigable waters." Hawkes contests this conclusion as contrary to the Act and Supreme Court precedent and seeks to have the JD overturned under the Administrative Procedure Act.

The APA "'creates a presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)). That presumption applies in this case. Like the Sacketts, Hawkes is subject to agency strong-arming under the law.

The Corps has conceded the Jurisdictional Determination is the agency's final word on jurisdiction. A plain reading of the APA should satisfy the "final agency action" requirement without further analysis. However, under *Bennett*, this Court has generally required such actions to have a particularized legal consequence. This Court employs a practical approach to determine if the agency action changes the legal regime or fixes a "right" or "obligation," even if the agency action does not have legal consequences independent of the underlying statute.

The JD in this case changes the legal regime by declaring through a formal site-specific adjudication that the Hawkes property contains "waters of the United States" subject to federal control under the Clean Water Act. The JD is conclusive as to federal jurisdiction and may be relied on for a period of five years. The JD has practical and legal consequences for the Corps and an inescapable coercive effect on Hawkes such that Hawkes is compelled to abandon any use of the Property (at ruinous cost), obtain an individual federal permit (at ruinous cost), or ignore the JD and proceed with the peat harvesting project without a permit and risk ruinous fines and criminal liability. The JD has other significant effects on Hawkes as well, including increased risk of liability, loss of an otherwise legal right to use the Property, and substantially increased costs.

Judicial review of the Jurisdictional Determination is consistent with this Court's case law, including *Sackett* and *Bennett*, and more particularly, *Abbott Labs.*, *Port of Boston*, and *Frozen Food Express*. The Corps has provided no contrary authority on facts analogous to this case. Therefore, the JD must be deemed "final agency action" under the APA.

Also, there is no "adequate remedy in court" that would justify any further delay in judicial review. The requirement that Hawkes go through a separate permit process before seeking judicial review, urged on this Court by the Corps, is nonsensical. The permit process is prohibitively costly in time and money, and punitive in effect. More importantly, it contributes nothing to the judicial resolution of the jurisdictional issue. It serves no litigation goal other than delay. The permit process does not, and cannot, advance the case

because it adds no relevant facts nor clarifies application of the law. The permit requirement is wasteful, unnecessary, and likely unconstitutional.

Additionally, the permit requirement undermines the presumption of reviewability and is tantamount to a decision on the merits in favor of the Corps. The primary reason to challenge the JD is to avoid the crippling cost and delay of an unnecessary permit. If Hawkes were to seek a permit and then successfully challenge the underlying Jurisdictional Determination in court, as the Fifth and Ninth Circuits require, Hawkes could never recover the needless expense of seeking the permit. This alone is sufficient to demonstrate the permit process is not an adequate remedy in court to challenge an erroneous jurisdictional claim.

Seeking judicial review by violating the Clean Water Act to trigger an enforcement action is likewise inadequate. The risk is too high. The penalties for discharging a pollutant without a permit are astronomical; tens of thousands of dollars a day in fines and criminal liability. Under *Ex parte Young*, a scheme requiring aggrieved parties to risk devastating fines and imprisonment to challenge the validity of a regulation is unconstitutional and invalid on its face.

Finally, the facts in this case give rise to numerous due process claims. This Court should rely on the constitutional avoidance canon and interpret the APA to avoid a constitutional conflict and allow immediate judicial review of the Jurisdictional Determination.

ARGUMENT

I

THE JURISDICTIONAL DETERMINATION IS FINAL AGENCY ACTION

The test for determining final agency action under the APA is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citations omitted). The second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights" *or* "obligations."

In furtherance of the "generous review provisions" of the APA, *id.* at 163, and the Act's strong presumption of reviewability, this Court's decisions take a pragmatic approach to finding agency action is final under the APA. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967); *accord Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Pacific Gas and Electric Co. v. State Energy Resource Conservation and Development Commission*, 461 U.S. 190, 200-01 (1983).

A. An Approved Jurisdictional Determination Is the Corps' Final Word on Jurisdiction

The Corps has abandoned its previous argument that an Approved Jurisdictional Determination is not the "consummation of the agency's decisionmaking process," as required under the first *Bennett* prong.

The Corps now concedes "the issuance of an approved jurisdictional determination marks the culmination of the distinct process by which the Corps informs a landowner whether the Corps believes that covered waters are present on a specified tract." Pet. Opening Brief at 26. This is a necessary concession because the argument is untenable under *Sackett*. In *Sackett*, this Court held a compliance order, that may be issued "on any information" and without any right of administrative review, is the agency's "last word" on jurisdiction, whereas the Jurisdictional Determination here is the result of a lengthy and detailed site-specific analysis concluding with an administrative appeal and remand.

> "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id.*, at 54-55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question.

Sackett, 132 S. Ct. at 1374 (Ginsburg, J., concurring).

Under a literal reading of the APA, this should end the inquiry into the finality question. The APA states in relevant part that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. This language is not ambiguous, and under the standard norms of statutory interpretation, the term "final" takes its ordinary meaning (i.e., conclusive or decisive). *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (holding the phrase "any other final action" in

§ 307(b)(1) of the Clean Air Act is clear and is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final); *see also Sackett*, 132 S. Ct. at 1373 ("[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."). Such a straightforward reading of the APA would give due deference to the presumption of reviewability on which the Act rests. *Id.*

Nevertheless, Hawkes addresses the second *Bennett* prong below.

B. Final Agency Action Does Not Require "Independent" Legal Consequences

Under the second *Bennett* prong, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). In evaluating whether legal consequences flow from an Approved Jurisdictional Determination, the Corps misconstrues the *Bennett* test. The Corps asserts, in reliance on the Fifth and Ninth Circuits, that legal consequences must flow from the JD, independent of the Clean Water Act. This is not the test.

In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d at 594, the court held a JD cannot satisfy the *Bennett* second prong because "Fairbanks' legal obligations arise directly and solely from the CWA and not from the Corps' issuance of an approved jurisdictional determination." Similarly, in *Belle Co.*, 761 F.3d at 391-92, the Fifth Circuit held the

JD was not reviewable under the APA because legal consequences did not flow "independently" from that determination but from the CWA. However, neither of these circuits nor the Corps cites any controlling authority for that proposition.

The language of the APA does not require "agency action" to have "independent" legal consequences, either expressly or impliedly. If such a requirement were imposed on the APA, it would preclude judicial review of most, if not all, interpretive or declaratory decisions and eviscerate the Act. *See* 5 U.S.C. § 551(13) (Defining "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent "); *id.* § 551(4) (Defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."); *id.* § 551(6) (Defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making."); and, *id.* § 551(11) (Defining "relief" as "the whole or a part of an agency—(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or, (C) taking of other action on the application or petition of, or beneficial to, a person.").

Moreover, no Supreme Court precedent is cited in support of this interpretation. There is, however, express contrary precedent. *Bennett* itself relied on *Port of Boston*, 400 U.S. at 70-71, that rejected the argument that a commission order about dockside storage fees "lacked finality because it had no

independent effect on anyone." The Court stated that argument had the "hollow ring of another era." *Id.* More importantly, the Court acknowledged agency actions "that have no independent coercive effect are common" and this Court had found such actions final and reviewable. *Id.* at 71.

According to this Court, "the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Id.* If "rights," "obligations," or "legal consequences" do not flow "independently" from the agency action, they must flow from the underlying statute. Therefore, the question before this Court is not whether a JD has legal consequences beyond the Clean Water Act, but whether the JD determines if the "rights" and "obligations" imposed by the Act apply to aggrieved parties. Through "the orderly process of adjudication," that's exactly what the JD did here. *Id.* In *Abbott Labs.*, 387 U.S. at 148-54, this Court cited a string of cases that found agency action "final" under the APA that involved nothing more than an interpretation of a statute, including many of those cases relied on by the Eighth Circuit below.

C. An Approved Jurisdictional Determination Is Designed To Have Legal Consequences

A recurring theme in the Corps' argument is that, in its effect, an Approved Jurisdictional Determination is similar to an informal agency opinion or warning letter, or even a consultant's report, and is merely

advisory. *See* Pet. Opening Brief at 33. The Eighth Circuit rejected this argument:

> The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169.

Pet. App. at 16a.

The "powerful coercive effect" of the Jurisdictional Determination in this case is that Hawkes must suffer grave consequences no matter what it does. Under the JD, Hawkes' only options are: (1) abandon the peat harvesting project, at great loss; (2) complete the permit process at exorbitant cost with no certainty of success; or (3) proceed with the project without a permit and incur crushing civil and criminal liability. The Corps simply ignores that reality when it argues a JD has no legal consequences.

The Corps appears to be confusing an informal Preliminary JD with a formal Approved JD. Corps' regulations provide for issuance of Preliminary Jurisdictional Determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. § 331.2. Preliminary Jurisdictional Determinations do not reflect a final conclusion about whether "waters of the United States" are present. *Id.*; *see* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008). Accordingly, Preliminary JD's "are advisory in nature and may not be appealed." Pet. Opening Brief at

25(a). This suggests that formal Approved JD's are something more than "advisory" in nature."

Contrary to a Preliminary JD that is more like an informal opinion letter, a formal Approved JD is based on a costly and extensive onsite investigation by the Corps itself: "Significant agency resources are necessary to perform the scientific and technical analysis required to produce" Jurisdictional Determinations. Pet. Opening Brief at 24. The investigator must consider the actual physical, chemical, and biological aspects of the site and draw complex factual and legal conclusions from the data gathered. *See* 33 C.F.R. § 331.9. Each investigation is different. Only an expert in this aspect of the law and science can make the final determination. "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." Pet. App. at 20a-21a (Kelly, J., concurring).

The Clean Water Act does not cover all waters. Therefore, jurisdictional waters must be determined on a case-by-case basis. This is the very purpose of the Jurisdictional Determination: "A landowner who procures a[n] [approved] jurisdictional determination, however, has the advantage of knowing the Corps' current, considered view as to whether there are waters of the United States on the landowner's property." Pet. Opening Brief at 22.

An Approved JD goes even further and determines what exemptions and permits apply: The "Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act to activities or tracts of land and the applicability of general permits or statutory

exemptions to proposed activities." *See* 33 C.F.R. § 320.1(a)(6).

The JD regulatory process even provides for a right of administrative appeal on exactly the same basis as a formal permit. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331."). Upon completion of an administrative appeal, Corps regulations declare a "determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). And, "[t]he determination reflects the agency's official view, and it will remain in effect for five years unless conditions change or new information comes to light." Pet. Opening Brief at 25.

An Approved JD has all the earmarks of final agency action: (1) it goes beyond the informal opinion of a Preliminary JD; (2) it is based on a costly and detailed site-specific analysis; (3) it addresses the "applicability of general permits or statutory exemptions;" (4) it represents the agency's "official view" on jurisdiction; (5) it is subject to the same administrative appeals process as a permit decision; (6) after appeal, the determination is considered "final agency action;" and (7) the JD can be relied on for five years. It is hard to believe the government would create such elaborate procedures and expend such extensive resources on a determination that was *not* intended to fix a legal "right" or "obligation." "It would be adherence to a mere technicality to give any

credence to [the government's] contention." *Abbott Labs.*, 387 U.S. at 152.

If the Act answered the question of whether a particular parcel contains jurisdictional wetlands, there would be no need for a Jurisdictional Determination. But there is such a need, as evidenced by the existence of the Corps regulations. It is the JD, not the Clean Water Act "that puts the administrative process in motion." Pet. App at 20a-21a (Kelly, J., concurring).

D. An Approved Jurisdictional Determination Has Legal Consequences for Permitting and Enforcement

The Corps repeatedly argues any relevant "rights" or "obligations" are determined by the Clean Water Act, not the Jurisdictional Determination. This is ironic in light of the Corps' admission that a JD is provided precisely because "[t]he CWA itself does not establish any mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites." Pet. Opening Brief at 3.

According to the Corps, a JD adds nothing to the Act, has no effect, and is not final agency action under the second *Bennett* prong. *See* Pet. Opening Brief at 20-44. But the same could be said of almost any agency action backed by statute, including a permit grant or a permit denial, which the Corps admits are reviewable under the APA. *Id.* at 45.

The JD here is reminiscent of the drug labeling requirement in *Abbot Labs.*, which the government argued was not reviewable because it could not be enforced directly but only when the Attorney General authorized "criminal and seizure actions for violations of the statute." *Abbott Labs.*, 387 U.S. at 151. This Court found "the argument unpersuasive" because "the agency does have direct authority to enforce this regulation in the context of passing upon applications for clearance of new drugs." *Id.* at 151-52.

Likewise, if a landowner discharges a pollutant into covered waters (as defined by the JD), without federal approval, the Corps has "direct authority" to rely on the JD in determining the nature of the violation. Moreover, with respect to the scope of covered waters, the Corps is legally bound by the JD during the permit process. *See* Pet. App. at 9a-10a. ("The Corps' Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a 'definitive, official determination that there are, or that there are not, jurisdictional "waters of the United States" on a site,' and stated that an Approved JD 'can be relied upon by a landowner, permit applicant, or other affected party for five years'").

Also, a third party can rely on the JD as prima facie evidence of a violation of the Clean Water Act. *See* Pet. App. at 34(a) (The Corps views the JD as final agency action "in the sense the public may rely on the determination."); *see also* Pet. Opening Brief at 3 ("In addition to establishing various government enforcement mechanisms, the CWA authorizes aggrieved private citizens to file suit against persons who are alleged to have made unlawful pollutant discharges into waters of the United States. *See* 33

U.S.C. § 1365(a)(1)[.]"). Such waters are defined by the JD.

If, on the other hand, a landowner discharges a pollutant into waters the Corps has determined are not covered by the Act (i.e., through a negative JD), the landowner can raise an estoppel defense against any related Corps enforcement action. *See Fairbanks North Star Borough*, 543 F.3d at 597 ("A negative finding would effectively assure [the landowner] that the Corps would not later be able to fault [the landowner's] failure to seek a permit.").

An Approved JD has very real legal consequences for the Corps, the landowner, and even the public. Under *Bennett*, it is enough if the agency action "alter[s] the legal regime to which the [agency] is subject." *Bennett*, 520 U.S. at 156. Therefore, the JD is final agency action under the APA.

E. An Approved Jurisdictional Determination Increases the Landowner's Potential Liability

In *Sackett*, this Court determined legal consequences flowed from the compliance order because, among other things, it increased the petitioners' potential liability "in a future enforcement proceeding." *Sackett*, 132 S. Ct. at 1372. So does the JD here.

The Eighth Circuit stated below an Approved Jurisdictional Determination increases "the penalties [Hawkes] would risk if they chose to begin mining without a permit" by exposing the landowner to "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." Pet. App. at 15a. The Corps does not dispute that such a risk

exists. Rather, the Corps affirms the increased risk of liability:

> The CWA does provide that a court, in assessing an appropriate civil penalty for a violation, should consider, *inter alia*, "any good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). The statute also imposes criminal penalties for knowing violations of the CWA, 33 U.S.C. 1319(c)(2). A landowner's receipt of a jurisdictional determination—and its consequent knowledge that the agency believes the CWA applies—could be offered as evidence of the owner's knowledge of the CWA's applicability.

Pet. Opening Brief at 32.

The only argument the Corps offers in mitigation of this risk is that the Clean Water Act does not assign any particular weight to a Jurisdictional Determination. *Id.* Therefore, the risk is only contingent. *Id.* But the Corps cannot deny that scienter is an element of a knowing violation and that landowners cannot claim ignorance or mistake once they are in receipt of an Approved JD. This necessarily increases the landowners' potential for increased liability, which is substantial. For example, a negligent violation of the Act limits civil fines to $37,500 per day, but allows a fine of up to $50,000 per day (or more when adjusted for inflation) for a knowing violation and increases jail time from 1 to up to 3 years. 33 U.S.C. § 1319. The Eighth Circuit was correct in holding the JD is like a compliance order in this respect and, under *Sackett*, the JD is subject to immediate review.

F. An Approved Jurisdictional Determination Has Other Legal Consequences

The effects of the Approved Jurisdictional Determination in this case are "direct and appreciable." *See Bennett*, 520 U.S. at 178.

The Jurisdictional Determination severely limits Hawkes' ability to use the Property for peat harvesting because Hawkes must now obtain an individual Clean Water Act (section 404) permit before the project can proceed. This is no small matter:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 C.F.R. § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74-76 (2002).

Rapanos, 547 U.S. at 721 (footnote omitted).

Those costs will likely be higher in this case because of the nine hydrological studies requested by the Corps, estimated at more than $100,000, and the looming requirement for a lengthy and costly Environmental Impact Statement the Corps has threatened to impose. JA at 17-18.

The JD has other, equally severe, consequences for Hawkes. It is axiomatic that the JD decreases the value of the property for peat harvesting and increases production, carrying, and loan costs. These effects are real and, in the aggregate, can effectively rob the landowner of all viable economic use. Simply depositing a bucket of soil in the wetland areas is a violation of the law. To say the JD has no consequences is to deny the obvious.

G. APA Review of an Approved Jurisdictional Determination Is Supported by Numerous Supreme Court Cases

The Corps has failed to cite a single Supreme Court case where APA review was denied in a case like this, where the agency action involved a case-specific adjudication and the applicant exhausted all administrative remedies, including appeal and remand. *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), on which the Corps relies, is not such a case. Pet. Opening Brief at 37.

In *FTC*, the Federal Trade Commission served a number of oil companies with a complaint stating the Commission had "reason to believe" these companies violated the Federal Trade Commission Act. 449 U.S. at 234. However, that complaint did not purport to be the Commission's final word on the violation. Instead,

it provided the offending oil company with an opportunity to participate in an administrative hearing for the purpose of determining whether the oil company actually violated the Act. *Id.* at 241-43. An opportunity the oil company declined. *Id.* This Court held the complaint was not "final agency action" because it was not a final adjudicative decision and for that reason the complaint itself had no legal consequence. *Id.* at 243. But that is quite different from the JD in this case where the recipient has completed the administrative review process and the JD itself purports to be a final adjudicative decision on jurisdiction. *See* 33 C.F.R. § 320.1(a)(6). *FTC* is, therefore, not analogous to this case.

Having found no analogous Supreme Court case, the Corps goes to great lengths to distinguish this case from the compliance order in *Sackett* and the Biological Opinion in *Bennett*. But this misses the mark. Under the APA, a final agency action need not have the compulsory effects of a compliance order or the coercive effects of a Biological Opinion, although the JD is similar in effect. In her concurrence below, Judge Kelly observed that *Sackett* compelled judicial review of the JD in this case:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This

> jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*.

Pet. App. at 20a.

Although judicial review of a JD is consistent with *Sackett* and *Bennett*, this Court has granted judicial review of other agency actions more akin to the Jurisdictional Determination in this case.

In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, cited by both *Sackett* and *Bennett*, this Court had to decide who had primary jurisdiction to review a rate order by the Maritime Commission and, in the process, this Court addressed the standard for determining final agency action. Relevant here is this Court's holding that agency orders need not create a new, independent legal consequence to be final. *Id.* at 70-71.

Citing *Frozen Food Express v. United States*, 351 U.S. 40 (1956), this Court concluded: "Agency orders that have no independent coercive effect are common" but that is not the "relevant consideration[] in determining finality." *Port of Boston*, 400 U.S. at 70-71. The relevant consideration, this Court stated, was "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Id.* at 71. In that case, there was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id.* So it is in this case. No further administrative review of the JD is required or even allowed. Now that the Corps has issued the JD, it will not revisit that determination even during the permit process. *See* Pet. Opening Brief

at 28. The JD is conclusive as to jurisdiction and legally binding on Hawkes and the Corps.

As for agency action that has "no independent coercive effect," an examination of *Frozen Food Express*, 351 U.S. 40, is helpful because it is most analogous to the present case. Frozen Food Express was a motor carrier that transported certain "agricultural commodities" that were exempt from regulation by the Interstate Commerce Commission, much like the remote wetlands in this case. When the Commission issued a determination that certain commodities were no longer subject to the agricultural exemption, Frozen Food Express sought to challenge the order in court. In determining the order was final and subject to judicial review, this Court recited these facts: (1) that "the determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities;" (2) that the "order" serves as a warning that transporting these commodities without authorization will subject the carrier to "civil and criminal risks;" (3) when unauthorized transportation occurs, the Commission can issue a cease and desist order enforceable in court; (4) that "[t]he 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs;" and (5) the "determination made by the Commission is not therefore abstract, theoretical, or academic." *Id.* at 43-44.

The facts here are remarkably similar to the facts in *Frozen Food Express*: (1) the determination that the wetlands on Hawkes' property are not exempt but

subject to federal jurisdiction has an immediate and practical effect on Hawkes' use of the Property, requiring federal approval to proceed; (2) the JD serves as a warning that anyone filling the wetlands at this site without authorization will be subject to civil and criminal liability; (3) when unauthorized filling occurs, the Corps can issue a cease and desist order enforceable in court; (4) a JD which classifies specific wetlands as subject to federal control is, indeed, the basis for Hawkes ordering and arranging its affairs; and (5) the JD is "not therefore abstract, theoretical, or academic." In its effect, the JD is virtually indistinguishable from the Commission's determination in *Frozen Food Express* that this Court found final and reviewable.

The only response the Corps offers to *Frozen Food Express* is that the ICC order in that case involved a rule of general applicability whereas this case does not. But, as the Eighth Circuit held below, the "JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier." Pet. App. at 12a. In *Abbott Labs.*, this Court described the case this way:

> Although the dissenting opinion noted that this ICC order had no authority except to give notice of how the Commission interpreted the Act and would have effect only if and when a particular action was brought against a particular carrier, and argued that "judicial intervention (should) be withheld until administrative action has reached its complete development," 351 U.S., at 45, 76

> S.Ct. at 572, the Court held the order reviewable.

Abbott Labs., 387 U.S. at 150.

For the same reasons, the JD should be reviewable here.

Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), is another case relied on in *Bennett*. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id.* at 113.

In this case, by reason of the Jurisdictional Determination, Hawkes is obliged to obtain a section 404 permit from the Corps if it wishes to proceed with its peat harvesting project. This obligation was only inchoate before the JD was issued. The Clean Water Act only requires a permit for discharges to "navigable waters" generally, which Hawkes can show do not exist on the Property. In contrast, the JD is an actual adjudicative decision requiring a federal permit for discharges on this specific property. It is a quintessential application of the law to the facts of the case. For the first time, this obligation is now final and conclusive; thereby denying Hawkes its legal right to proceed with the peat harvesting project without federal approval.

In addition to these cases, the Eighth Circuit relied on *Abbott Labs.* in which this Court held prescription drug labeling regulations were subject to pre-enforcement review as final agency action, because the regulations "purport to give an authoritative interpretation of a statutory provision" that puts drug

companies in the quandary of either incurring massive compliance costs or risking civil and criminal sanctions for distributing misbranded drugs. The Eighth Circuit found *Abbott Labs.* analogous to this case because the JD puts Hawkes in a similar quandary. In light of the JD, Hawkes must either "incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial penalties." Pet. App. at 11a.

Finally, the Eighth Circuit relied on *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), for the proposition that final agency action need not be self-executing, like the JD in this case. Pet. App. at 12a-13a. "Though the Revised JD is not-self-executing, 'the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction.'" *Id.* at 13a (citing *Sackett*, 132 S. Ct. at 1373). Under this Court's precedents, the Jurisdictional Determination here has all the hallmarks of final agency action.

H. The Approved Jurisdictional Determination Has "Independent" Legal Consequences

If this Court decides, contrary to Supreme Court precedent, to accept the Corps' argument that the second *Bennett* prong requires final agency action to have independent legal consequences, this Court should take into account the facts of this case. The facts show the Corps did not carry its burden of demonstrating a "significant nexus" between the Hawkes property and the Red River of the North 120 miles away.

This is a 12(b)(6) dismissal case wherein the facts are taken as asserted, as the Eighth Circuit did below. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true.").

The JD is based on the Corps' unsupported conclusion that the Property meets the "significant nexus" test proffered by Justice Kennedy in *Rapanos*. JA at 18-19. That test requires the Corps to show the Property has a significant impact on a Traditional Navigable Water. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). However, as alleged in the complaint, on appeal the Review Officer found: "the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative [data] given to support the finding." JA at 48. The record "does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [Traditional Navigable Water]." JA at 52-53. And, "the water flow regime information was not sufficient to indicate that a significant nexus exists." JA at 54. Nevertheless, on remand, the District Engineer issued the Approved JD without providing the missing data.

On these facts, the Corps should have issued a negative JD, finding no jurisdictional "waters of the United States" on Hawkes' property. Therefore, the permit requirement for Hawkes' peat harvesting project flows from the JD, not the Clean Water Act. But for the JD, Hawkes would be free to exercise its right to harvest the Property without federal approval.

The JD changed the legal regime and is final agency action under the APA.

II

THERE IS NO ADEQUATE REMEDY IN COURT

"Final" agency action is judicially reviewable under the APA if there is "no other adequate remedy in a court." 5 U.S.C. § 704. There is no such remedy for an Approved Jurisdictional Determination. The alternative of seeking a permit first or risking an enforcement action is not adequate. To the contrary, these approaches are prohibitive, wasteful, unnecessary, insupportable, and likely unconstitutional.

A. The Cost of Seeking a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Prohibitive

In *Rapanos*, this Court relied on the Sunding Report that estimated the average cost of seeking an individual permit (like that required here) at more than $270,000 and two years to process. The report estimated that even a nationwide permit would cost almost $29,000 and take almost a year to process. *See Rapanos*, 547 U.S. at 721.

The Corps quibbles with Sunding's data but offers no better. The Corps admits it has no formal reporting data on permit costs—either for nationwide or individual permits. Pet. Opening Brief at 48. Instead, the Corps relies on anecdotal evidence of sample projects or ad hoc interviews. *Id.* 48-49. The Corps' 2001 study on the cost of individual permits

inexplicably "excluded projects affecting more than three acres." Pet. Opening Brief at 49. This would necessarily skew the data to show a lower than average cost for such permits. The Corps data is more unreliable than the Sunding data, giving the Court every reason to take the Sunding estimates at face value.

Also, the Corps puts great weight on the fact that most permits are of the general or nationwide variety that cost much less than an individual permit. *Id.* at 48-49. But the Corps ignores the fact that an individual permit is required in this case. This is undisputed. Hawkes actually commenced the permit process to harvest 150 acres of peat on the Property but put things on hold when the Corps asked for expensive hydrological studies (estimated at $100,000), played up the cost and delay from a full Environmental Impact Statement, and pointedly suggested the Corps might never grant the individual permit after years of study. JA at 16-19. Whatever the average cost of an individual or nationwide permit, in this case the cost became prohibitive, even punitive. And should Hawkes ultimately win the case in court, after obtaining a permit or permit denial, Hawkes can never recover the costs expended in the permit process. Pet. App. at 14a. Only those who can afford to seek a permit and the subsequent cost of litigation, which can also run into hundreds of thousands of dollars, can ever be vindicated. Therefore, Hawkes sought immediate judicial review of the JD in court.

B. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Wasteful and Unnecessary

If a landowner wishes to contest an erroneous Jurisdictional Determination, it should be unnecessary for the landowner to seek a permit after the administrative appeal. The process is costly and time consuming yet it contributes nothing to the judicial resolution of the jurisdictional issue. The Corps admits it will not revisit the JD during the permit process, except in the unusual case of changed circumstances. *See* Pet. Opening Brief at 28. The permit process does not make a JD more fit for judicial review. It would neither add any relevant facts nor clarify application of the law. It's a costly and pointless exercise which the law does not abide.

Stated in various ways, the ancient maxim "lex non cogit ad inutilia," or "the law does not know useless acts," has been a fundamental tenet in Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People ex rel. Bailey v. Greene County Supervisors*, 12 Barb. 217, 221-22 (N.Y. 1851); *see also Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 246 (1845) ("[T]he law never requires a vain act."); and *Stevens v. United States*, 2 Ct. Cl. 95, 100 (1866) ("[T]he law does not require the performance of a useless act.").

The Corps seeks to impose a useless permit requirement on landowners to delay or avoid its

untested claims of jurisdiction which are often wildly broad and unpredictable. This is because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citing U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004)).

There is no regulatory or statutory provision that requires Hawkes to seek a permit that has nothing to do with the underlying jurisdictional challenge, to obtain APA review. To the contrary, a JD, standing alone, is as fit for judicial review as any permit decision. *See* 33 C.F.R. § 320.1(a)(6) ("A [jurisdictional] determination pursuant to this authorization shall constitute a Corps final agency action."). Corps regulations acknowledge the JD as a separate, adjudicatory action on a par with a permit decision. They even provide for identical administrative appeal procedures as a predicate for judicial review. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. Part 331. An affected party must exhaust any administrative appeal available pursuant to 33 C.F.R. Part 331 and receive a final Corps decision on the appealed action prior to filing a lawsuit in the Federal courts (*see* 33 C.F.R. 331.12).").

It would be perverse, therefore, to require a landowner to go through the costly and time-consuming process of obtaining a JD and administrative appeal, then require the landowner to

run the gauntlet of a costly and time-consuming process of seeking a permit and another administrative appeal that has nothing to do with the question of jurisdiction. This approach is unnecessary and undermines the presumption of reviewability.

Moreover, rather than preserve private and judicial resources, the permit requirement squanders resources. First, it requires a costly and lengthy process that adds nothing to the case. This drains both private and agency resources to no beneficial end. Second, if a court ultimately decides a permit was not required, neither the landowner nor the Corps can recover the costs expended in processing an unnecessary permit. Pet. App. at 14a. Third, the issues surrounding a permit, such as mitigation, timing, restoration, etc., are all issues that are irrelevant to the jurisdictional question and are more likely to complicate rather than expedite the case. And fourth, the permit requirement defies commonsense. Why is it necessary to seek a permit to determine whether a permit was required in the first place? As Judge Kelly noted in her concurrence below, this is an odd and circuitous route to judicial review.

> Despite the[] dissimilarities with the circumstances in *Sackett*, I agree that Hawkes is left without acceptable options to challenge the JD, absent judicial review. Hawkes's choice is to either (1) follow through on their peat-mining plans until either the EPA issues a compliance order or the Corps commences an enforcement action, to both of which Hawkes could raise lack of CWA jurisdiction as a defense; or (2) apply for a permit (on the grounds that no permit is

> required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an "adequate remedy" to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.

Pet. App. at 20a.

C. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Tantamount to a Decision on the Merits

The obvious purpose of seeking immediate judicial review of an Approved Jurisdictional Determination is to avoid the unnecessary cost and delay of seeking a permit. Given the expense and uncertainty associated with seeking a permit, very few would have the ability to pile on even more expense and delay in court just to determine whether the Corps's claim of jurisdiction was correct. The impact on Hawkes would be severe; expanding to the new property is essential to the company's future growth. JA at 14-15. A win in court is a hollow victory if the landowner has already endured the arduous permit process without any hope of recouping the attendant costs. But, this is by design:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review

> evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

Pet. App at 15a-16a.

Requiring a permit before judicial review of a JD denies Hawkes any meaningful remedy in court.

D. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Circumvents the Intent of Congress

Once it is acknowledged that an agency action is final, the only thing remaining is to ensure the aggrieved party has an "adequate remedy in a court." 5 U.S.C. § 704. This is not a limitation on judicial review. Rather, it is a mandate to ensure the intent of Congress is carried out—"[T]he APA provides for judicial review of all final agency actions." *Sackett*, 132 S. Ct. at 1373. Therefore, any process imposed on the aggrieved party must *facilitate* judicial review. But the permit requirement is not such a process. It obstructs judicial review.

The Jurisdictional Determination is valid for five years and the Corps cannot revisit the determination during the permit process, except in changed circumstances. *See* Pet. Opening Brief at 28. Therefore, the permit process cannot aid in resolving the underlying dispute—whether the Hawkes property contains "waters of the United States" subject to federal regulation under the Clean Water Act. Its sole purpose is to delay or deter judicial review.

Imposing the permit requirement on Hawkes allows the Corps, rather than Hawkes, to set the time for judicial review, contrary to congressional intent. The Corps can use the permit process to delay or avoid judicial review of a permit decision, and hence the jurisdictional question, indefinitely. The Corps can declare the permit application incomplete, or fail to process the application in a timely manner, or even refuse to issue a permit decision at all so as to avoid

judicial review of its jurisdictional decisions. By that means, the Corps can wear down the applicant so the applicant must accede to all Corps demands or walk away from the project at great loss.

This Court found the option of waiting on an enforcement action inadequate as a remedy in the *Sackett* case in part because of the landowners' inability to initiate judicial review. *See Sackett*, 132 S. Ct. at 1372. The same reasoning applies here. The pace of the permit process is dictated by the Corps.

To illustrate, in *Moore v. United States*, 943 F. Supp. 603 (E.D. Va. 1996), taxpayers sought a refund of taxes paid to the Internal Revenue Service, arguing they could claim as a loss the involuntary conversion of some of their investment property (called "the Boy Scout Tract") as a result of the land being reclassified as wetlands. *Id.* at 607. Though the Moores had not tried to obtain a section 404 permit, they argued the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. As reported by the Court, several experienced individuals, including Bernard Goode, an environmental consultant that had been a Corps employee for 34 years, testified on the Moores' behalf:

> When asked for his opinion concerning the likelihood that [an individual] § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:

"It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.

"And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps withdraws the application.

"And that is the outcome of well over half of the 404 applications.

"Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases [that] end up being withdrawn for section 404 permit applications. Only one percent end up being denied."

Goode's testimony on this latter point was corroborated by the Moores' other two expert witnesses. Robert Kerr ("Kerr"), an environmental consultant with experience in over sixty (60) § 404 permit applications, testified:

"We advised the [Moores] that there was no chance of getting a permit.

"We also told Mr. Moore [the Corps] would never reject the permit.

> "Because rejecting a permit could set a precedent also. And as the government's attorney stated, you have to have a permit denial to go for a taking.
>
> "Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project."
>
> Doug Davis ("Davis"), an environmental consultant who at one time worked in the Corps' wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was "as close to zero as it can get," and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract "just sort of wither on the vine and no final agency action is taken." In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.

Id. at 612 (citations omitted).

This excerpt demonstrates the remarkable leverage the Corps has over CWA permit applicants. With very little risk to the agency, the Corps can scuttle a project with dilatory practices or condition approval on extraordinary demands.

The inability of a landowner to seek judicial review of an Approved Jurisdictional Determination shields the Corps from suit and allows the agency to exercise plenary authority over disputed waters with impunity. The APA should not be read to allow such a blatant subversion of the law. This is not an adequate remedy in court.

E. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Undermines the Presumption of Reviewability

In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), this Court discussed the legislative and common law history of the APA and concluded the Act is animated by "the strong presumption that Congress intends judicial review of administrative action." That presumption, ignored by the Corps, dictates that statutory limitations on judicial review of agency action should be interpreted narrowly. *See id.* ("'[J]udicial review of a final agency action by an aggrieved person shall not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Labs.*, 387 U.S. at 140)). This strong presumption requires "that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review [of administrative action].'" *Id.* at 671 (quoting *Abbott Labs.*, 387 U.S. at 141). But the Corps has provided no such evidence.

The Corps' argument that Congress intended the permit process to provide the sole means of access to the Courts for review of JD's has no support in the law.

Neither the CWA nor its implementing regulations show "clear and convincing evidence" that Congress intended judicial review of administrative decisions only after completion of the permit process. *See Sackett*, 132 S. Ct. at 1372 ("Nothing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise.").

In *Sackett*, this Court rejected EPA arguments that the Clean Water Act was intended to preclude review of nonpermit decisions. The EPA argued judicial review of compliance orders would undermine the Clean Water Act because such orders serve an informational purpose and are designed to encourage voluntary compliance and avoid judicial proceedings. *Id.* at 1372. The Corps says the same for Jurisdictional Determinations here. Pet. Opening Brief at 20. But this Court held, "It is entirely consistent with this function to allow judicial review when the recipient does not choose 'voluntary compliance.'" *Sackett*, 132 S. Ct. at 1373. "The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice." *Id.*

The EPA also argued the compliance order was not reviewable under the APA because the order was not self-executing. However, this Court rejected the argument outright observing "the APA provides for judicial review of all final agency actions, not just those that impose [] self-executing sanction[s]." *Id.* This is consistent with this Court's application of the APA in other cases, such as *Abbott Labs.*, *Bennett*, *Port of Boston*, and *Frozen Food Express* discussed above.

Finally, the EPA warned in *Sackett* it was less likely to use compliance orders if they are subject to immediate judicial review. This Court did not consider

that rationale a reason to preclude judicial review of compliance orders. *Id.* To the contrary, the Court explained, "That may be true—but it will be true for all agency actions subjected to judicial review." *Id.* at 1374. And, indeed, the Corps makes this same claim for Jurisdictional Determinations here. *See* Pet. Opening Brief at 37. But this Court held the presumption of reviewability trumps such concerns:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

Sackett, 132 S. Ct. at 1374.

That conclusion applies equally to Jurisdictional Determinations. According to the agency, the "Corps issues tens of thousands of approved jurisdictional determinations every year. [However] in fiscal year 2015, interested parties filed [only] eight administrative appeals of approved jurisdictional determinations issued outside of the permitting process." Pet. Opening Brief at 5-6.

The dearth of appeals does not indicate a lack of need for judicial review; rather, it demonstrates that opening the courthouse doors to judicial review of JDs will not undermine the Corps program in that few landowners challenge the Corps' decisions. Curtailment of the JD program is unlikely and would be counterproductive. It is the Corps that has the most to gain by continuing the JD program, even if JD's are subject to immediate judicial review. Statistically, all but a few recipients (i.e., eight in 2015) defer to the agency's determination on jurisdiction. This allows the Corps to implement the Clean Water Act with wide discretion without pursuing tens of thousands of enforcement actions that would result from curtailing or eliminating JDs. Therefore, providing judicial review of JDs will not deter Corps reliance on Jurisdictional Determinations, but it would potentially bring justice to those who have a legitimate grievance with the Corps over the scope of federal authority under the Clean Water Act.

The Clean Water Act does not "preclude judicial review" under the APA, 5 U.S.C. § 701(a)(1). The APA creates a "presumption favoring judicial review of administrative action." *Block v. Community Nutrition Institute*, 467 U.S. at 349. While this presumption "may be overcome by inferences of intent drawn from the statutory scheme as a whole," *id.*, the Corps' arguments do not support an inference that the Clean Water Act's statutory scheme precludes APA review.

F. An Enforcement Action Is Not An Adequate Remedy in Court

The Corps argues Hawkes has an adequate remedy in court because Hawkes can proceed with the project without federal approval and precipitate an

enforcement action by the Corps, the EPA, or a third-party citizen. In each case, the Corps maintains Hawkes could seek review of the jurisdictional question in any subsequent judicial proceeding. Pet. Opening Brief at 50. But this is far from adequate.

In *Sackett* this Court rejected the idea that the Sacketts could seek judicial review in an enforcement proceeding because they "[could not] initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability," not to mention criminal sanctions. *Sackett*, 132 S. Ct. at 1372. The situation in this case is no better. If Hawkes proceeds with the peat harvesting project without a permit, Hawkes has no control over the timing or nature of the ensuing enforcement action. In *Sackett*, EPA officials issued a verbal cease and desist order but left the Sacketts hanging for more than six months before issuing a compliance order. The government could do the same here. Likewise, there is no telling if or when a third party may bring a citizen suit against Hawkes. But onerous penalties would accrue from the first day of the unauthorized discharge. An enforcement action could be delayed for years without judicial review, wearing down the landowner to compel compliance.

This Court rejected such an approach in *Ex parte Young*, 209 U.S. 123 (1908). In that case, this Court considered the validity of a shipping rate increase imposed on railroads by the state legislature. The railroads took the position the rates were "unjust, unreasonable, and confiscatory." *Id.* at 130. Anyone who refused to adhere to the rate increases, including the officers and employees of the railroads, would be

subjected to severe civil and criminal liability. *Id.* at 130-31. But the only way to test the validity of the rate orders was to disobey the order and risk such liability. This Court held the order raised a serious constitutional question:

> But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

Id. at 146.

This Court held: "when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given." *Id.* at 147.

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Id.

The enormity of the penalties for violating the Clean Water Act are well documented and may include penalties of tens of thousands of dollars a day and

imprisonment, with heightened sanctions for knowing violations. *See* 33 U.S.C. § 1319. Thus, under *Ex parte Young*, triggering an enforcement action to challenge the validity of a Jurisdictional Determination raises a constitutional question and is not an adequate remedy in court. Moreover, because the requirement to seek an individual permit in this case would itself be "unjust, unreasonable, and confiscatory," even that requirement would raise a constitutional question and fail to provide an adequate remedy in court.

G. The APA Should Be Interpreted To Avoid Constitutional Questions

In addition to the constitutional questions raised above under *Ex parte Young*, it should be observed that in *Kent Recycling Services v. U.S. Army Corps of Engineers* (14-493), now pending in this Court, the petitioner raised a due process challenge to the Jurisdictional Determination on facts nearly identical to the facts in this case. In that case, as in this case, the Corps issued a final Approved Jurisdictional Determination without correcting the deficiencies identified by the Corps Review Officer on administrative appeal. Kent Recycling Pet. at 9. The Approved JD was demonstrably invalid and its issuance deprived the landowner of the right to use its property without a fair hearing. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24 (1981) ("'[D]ue process has never been, and perhaps can never be, precisely defined. [But] the phrase expresses the requirement of 'fundamental fairness.'"). Although Hawkes did not raise a due process challenge to the JD in this case, the case does give rise to such a claim. In fact, there are a number of circumstances in this case that raise constitutional questions:

First, the amended complaint alleges the final Approved Jurisdictional Determination was issued on remand without correcting the deficiencies the Corps Review Officer documented on administrative appeal. Hawkes was deprived of an impartial hearing.

Second, as the Eighth Circuit observed: "the Amended Complaint alleged that the Corps' District representative repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat would ultimately be refused." Pet. App. at 14a. On these facts, it would be futile to impose a permit requirement on Hawkes to "ripen" the case for judicial review.

Third, the documented cost (in money and delay) of an individual permit is prohibitive and punitive, perhaps beyond the reach of Hawkes. If a permit is required for judicial review under the APA, that cost and delay could never be recovered. Pet. App. at 14a.

Fourth, the permit requirement does not and cannot advance the case because the Jurisdictional Determination is conclusive as to jurisdiction. The permit process serves no meaningful purpose; it is an arbitrary barrier to timely redress in court. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

And fifth, the permit requirement is inconsistent with the plain language of the APA and Corps regulations that say the JD is final agency action. *See* 33 C.F.R. §§ 320.1; 329.3.

In *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), this Court cited the constitutional avoidance canon for the proposition that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." According to this Court, "one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381. And further, "[t]he canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

In this case, this Court must choose between the implausible interpretation that the APA requires an aggrieved party to obtain a costly and needless permit as a predicate for judicial review, on the one hand, and immediate judicial review of a binding, site-specific adjudicative Jurisdictional Determination, on the other. The former raises a multitude of constitutional questions. The latter reinforces the purpose and intent of Congress—"the strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670.

CONCLUSION

Landowners should have the right to challenge agency overreaching in court, especially a contested "threshold determination that puts the administrative process in motion." Pet. App. at 20a (Kelly, J., concurring). The only practical way for that to happen is through immediate judicial review of Approved

Jurisdictional Determinations under the APA. A JD has all the hallmarks of final agency action, but a landowner has no adequate remedy in court. *See* 5 U.S.C. § 704.

This Court should therefore sustain the Eighth Circuit decision below.

DATED: February, 2016.

Respectfully submitted,

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MAR 23

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 15-290

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

During the four decades since Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, the United States Army Corps of Engineers (Corps) has issued jurisdictional determinations on request, in order to inform property owners of the Corps' view on whether and to what extent their property falls within the CWA's coverage. A jurisdictional determination is not subject to immediate judicial review because it is not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. A jurisdictional determination does not alter the range of legally available options, but simply gives the landowner additional information to consider in choosing among those alternatives.

Respondents primarily contend (Br. 16) that an affirmative jurisdictional determination (expressing the Corps' view that waters protected by the CWA are

present on the relevant tract) should be judicially reviewable because it creates a strong practical disincentive to development of the property. But agency statements of opinion regarding the legal status of particular conduct often influence private parties' decisions; indeed, they are useful for precisely that reason. Non-binding agency recommendations to a final decisionmaker outside the agency likewise can have significant practical impacts. Absent any alteration of legal rights and obligations, however, such practical effects are insufficient to render agency communications reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

Although the Corps' longstanding practice of providing jurisdictional determinations upon request affords significant benefits to landowners, the CWA neither mandates nor explicitly references that practice. If jurisdictional determinations are not subject to immediate review, a landowner may challenge the agency's coverage determination if it is denied a permit, is granted a permit on terms that it finds objectionable, or is subjected to an enforcement action. In enacting the CWA without providing for standalone jurisdictional determinations, Congress evidently contemplated that those avenues of judicial review, taken together, would provide an adequate means of resolving disputes about the scope of CWA coverage.

I. A JURISDICTIONAL DETERMINATION IS NOT "FINAL AGENCY ACTION"

A. A Jurisdictional Determination Is An Informational Tool That Assists Landowners In Assessing Their Rights And Obligations Under The CWA

1. The CWA requires that any discharges of pollutants into the "waters of the United States" must be authorized, either by the statute itself or by a permit. 33 U.S.C. 1362(7); see 33 U.S.C. 1251(a), 1311, 1344. A potential discharger may seek a permit, which if granted provides advance assurance that the discharges are lawful; may discharge without a permit if it is sufficiently confident that one is not required; or may avoid both potential liability and the costs of the permitting process by forgoing any discharges into areas that are even arguably protected by the Act. 33 U.S.C. 1319, 1344(p). That choice is not different in kind from the choices that regulated parties often face when the line between lawful and unlawful conduct is not wholly clear.

Judicial review of the Corps' final permitting decision is available under the APA. Alternatively, a landowner that discharges without a permit may argue in any subsequent enforcement proceeding that a permit was unnecessary, either because the discharges were not into CWA-protected waters or because they were otherwise authorized by the statute. If the Corps had never adopted its practice of issuing standalone jurisdictional determinations upon request, those would clearly be the only available avenues for judicial resolution of CWA-coverage disputes.

2. Respondents contend (Br. 16) that the affirmative jurisdictional determination in this case had "an inescapable coercive effect on Hawkes" by requiring

Hawkes to choose among the three options described above. But respondents would have been compelled to choose among the same three options if they had not sought a jurisdictional determination, if they had received a negative jurisdictional determination, or if the Corps had never adopted the practice of issuing jurisdictional determinations upon request. An affirmative or negative jurisdictional determination may substantially affect the recipient landowner's assessment of the relative advantages and disadvantages of the three options described above, but it does not affect the actual legality or illegality of any pollutant discharge.

Respondents seek to analogize a jurisdictional determination to "a permit grant or permit denial, which the Corps admits are reviewable under the APA." Resps. Br. 26. As our opening brief explains (at 39-40), that analogy is inapt. The Corps' issuance of a CWA permit does not reflect the agency's opinion that the authorized discharges are already lawful; it *causes* those discharges *to be* lawful. That is precisely the operative legal effect that a jurisdictional determination lacks.

3. Respondents and their amici suggest that acceptance of the government's position would have disruptive effects on large numbers of landowners whose activities are potentially subject to the CWA. Until the decision below, however, no court had held that a standalone jurisdictional determination is reviewable final agency action. Holding that jurisdictional determinations are not immediately reviewable therefore would not impose any new disability on landowners, but would simply reaffirm that they may

obtain judicial review of CWA-coverage questions only through the mechanisms they have previously utilized.

B. A Jurisdictional Determination Is Not "Final Agency Action" Because It Does Not Determine Legal Rights Or Obligations, Or Impose Legal Consequences

A jurisdictional determination is not immediately reviewable because it does not have an essential attribute of "final agency action": it does not determine "rights or obligations" or impose "legal consequences." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). In resisting that conclusion, respondents argue that the Court should discard or dilute the well-established "legal consequences" requirement. They also contend that a jurisdictional determination has various legal consequences. Neither argument has merit.

1. Agency action is not final unless it determines legal rights or obligations, or imposes legal consequences

a. This Court has long held that "two conditions" "must be satisfied" before agency action is considered final and reviewable: it "must mark the consummation of the agency's decisionmaking process," and it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-178 (citations and internal quotation marks omitted); see Gov't Br. 25-26. Respondents argue (Br. 18-20) that one of those "two conditions" is enough, and that a jurisdictional determination should be considered "final agency action" if it satisfies *Bennett*'s first prong. That contention cannot be squared with *Bennett*, or with other decisions before and after *Bennett* that have applied the

same two-pronged standard. See, *e.g.*, *Sackett* v. *EPA*, 132 S. Ct. 1367, 1371-1372 (2012); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 483 (2004); *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 234, 241 (1980).

Bennett's requirement that the challenged action must not only be the consummation of agency decisionmaking, but also must actually alter the legal obligations of regulated entities, serves a critical purpose. Numerous agency actions—for instance, letters stating an agency's interpretation of a statutory provision or its view as to an entity's obligation—may represent the consummation of agency decisionmaking with respect to particular issues. See, *e.g.*, *Air Brake Sys., Inc.* v. *Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (Sutton, J.). Subjecting every such communication to immediate judicial review, whether or not it has any concrete legal effect, would enmesh the courts in abstract, piecemeal disputes and disrupt agencies' administrative processes. It would also "muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business." *Independent Equip. Dealers Ass'n* v. *EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.).

The same principle applies when one agency provides a recommendation to another federal actor who has final decision-making authority. See *Franklin*, 505 U.S. at 796-799; *Dalton* v. *Specter*, 511 U.S. 462, 468-471 (1994). Transmittal of the recommendation may reflect the consummation of the recommending agency's work. But if the recipient is legally free to accept or reject the recommendation, that communica-

tion is "not final and therefore not subject to review." *Franklin*, 505 U.S. at 798. The Court in *Franklin* and *Dalton* reached that conclusion even though the consequence was to preclude any non-constitutional review at all, since the President (the official responsible for making the final decision under both statutory schemes) is not an "agency" for purposes of the APA. See *Franklin*, 505 U.S. at 800-801; *Dalton*, 511 U.S. at 470, 476-477. Here, by contrast, although respondents contend that alternative avenues of review are inadequate, judicial review of CWA-coverage issues is unquestionably available both in the permitting context and in enforcement proceedings. See pp. 20-24, *infra*.

b. Respondents argue (Br. 20-22) that, under *Bennett*'s second prong, an agency action need not impose "independent" legal consequences. Although their argument is somewhat cryptic, respondents appear to contend that the agency action itself need not "alter the legal regime" in order to be final. 520 U.S. at 178. That is incorrect.

Quoting the APA's exhaustive definition of "agency action," respondents assert (Br. 21) that the "language of the APA does not require 'agency action' to have 'independent' legal consequences." Respondents do not identify the specific language in the APA definition that they believe supports their argument. In any event, this Court has squarely held that, in order to constitute "final agency action" under the APA, a particular action "must be one by which rights or obligations have been determined," or from which "legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation and internal quotation marks omitted). The Court in *Bennett* distinguished *Franklin* and *Dalton* on precisely that ground. See *ibid.* ("Unlike

the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.").

In accord with that formulation, the agency actions this Court has held to be final have themselves altered the pertinent legal regimes by determining parties' rights or obligations. A published rule, for instance, is final when it has the "status of law," *i.e.*, when it is intended to impose binding legal obligations. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151-152 (1967); *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 418 (1942).[1] The EPA compliance order at issue in *Sackett* was final because it directed the recipient to take particular actions and imposed penalties for violating the compliance order itself. 132 S. Ct. at 1371-1372; see Gov't Br. 42-43. An agency order (such as a CWA permit) that determines whether a party's activities are exempted from or subject to a statutory prohibition is final because it "render[s] the prohibitions of the statute inoperative" or operative. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 133 (1939). In that situation, as respondents point out (Br. 22), the regulated party's obligations are set forth in the statute rather than the agency's order. But the agency's action nevertheless determines the actual

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[1] Although a published rule having the force of law is "final agency action" within the meaning of the APA, the susceptibility of such a rule to pre-enforcement review depends on a separate ripeness inquiry. See *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158, 162-165 (1967) (holding that published agency regulation was "final agency action" but was not ripe for judicial review); see generally *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *Abbott Labs.*, 387 U.S. at 152.

legality of the party's conduct by resolving whether the party must conform to the statutory requirements.

In arguing that an agency action can be immediately reviewable even if it does not have independent legal effect, respondents rely (Br. 21-22) on *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970). That decision is consistent with the Court's other "final agency action" precedents. The Federal Maritime Commission had authority to review the legality of filed tariffs under the Shipping Act and to modify, prohibit, or approve them. *Id.* at 65 & n.9. The Court held that an order establishing that the tariff was legal and enforceable was final. *Id.* at 65-66, 71. As respondents point out (Br. 22), the Court observed that the order was not "coercive," in that it did not affirmatively direct any party to take any particular action. *Port of Boston*, 400 U.S. at 71. But the order nonetheless determined rights or obligations by establishing that the tariff could be enforced.

2. A jurisdictional determination does not alter legal rights or impose legal consequences

a. A jurisdictional determination does not affect a landowner's ability to obtain a permit, see Gov't Br. 27-29, and it does not opine on whether the landowner's planned activities (of which the Corps may be unaware) would require a permit or predict whether a permit would be granted, see 33 C.F.R. 331.2. Respondents are therefore incorrect in arguing (Br. 24) that a jurisdictional determination "determines what exemptions and permits apply" if the landowner wishes to discharge pollutants into waters on its lands. Respondents rely (Br. 24-25) on a Corps regulation that states that the "Corps has authorized its district

engineers to issue formal determinations concerning the applicability of the [CWA] * * * and the applicability of general permits or statutory exemptions." 33 C.F.R. 320.1(a)(6). That language simply defines the responsibilities of Corps district engineers to include both sorts of determinations; it does not suggest that the second determination is encompassed within the first. Another Corps regulation unambiguously refutes respondents' reading of Section 320.1(a)(6) by stating that jurisdictional determinations "do not include determinations that a particular activity requires a [Corps] permit." 33 C.F.R. 331.2.

Respondents are also incorrect in asserting (Br. 27) that "the Corps is legally bound by the [jurisdictional determination] during the permit process." While the Corps is unlikely as a practical matter to revisit a recent jurisdictional determination during the permitting process, the applicant may trigger a reassessment by presenting new information. See Gov't Br. 5. And even without new information, the applicant may dispute the Corps' regulatory jurisdiction over a particular site in an administrative appeal of a permit denial, even if it has previously (and unsuccessfully) pursued an administrative appeal from the standalone jurisdictional determination. 33 C.F.R. 331.5(a)(2); Gov't Br. 29 n.7. In either circumstance, if the Corps is persuaded by the applicant's showing, it may reverse its earlier jurisdictional determination and conclude that no permit is necessary because CWA-protected waters are not present at the relevant site.

b. A jurisdictional determination also does not alter the recipient's potential legal exposure to CWA

liability, or alter the range of enforcement mechanisms the landowner might face. See Gov't Br. 29-33.

Respondents argue (Br. 27-28) that a jurisdictional determination gives rise to legal consequences because it is binding on the government in subsequent enforcement actions. That is incorrect. When the Corps or EPA considers enforcement action after the Corps has already issued a standalone jurisdictional determination, the agencies will as a matter of practice "rely" (Resps. Br. 27) on that determination and ordinarily will not revisit the determination absent some reason for doing so. But no statutory or regulatory provision legally binds either the Corps or the EPA to treat an existing jurisdictional determination as controlling if the agency comes to believe it is incorrect.[2]

The Corps' regulations do not limit its authority to revisit its own jurisdictional determinations, and it

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[2] The EPA or the Corps may institute a proceeding for administrative penalties, 33 U.S.C. 1319(g); the EPA may issue a compliance order, 33 U.S.C. 1319(a), or initiate a judicial enforcement action, 33 U.S.C. 1319(b); and the Corps may issue an order requiring compliance with a permit, 33 U.S.C. 1344(s)(1), or initiate a civil action seeking compliance with a permit and a penalty, 33 U.S.C. 1344(s)(3) and (4). In general, the Corps has primary enforcement authority for violations of Corps-issued permits and some unpermitted discharges, and the EPA handles more serious unpermitted discharges. See *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (1989), http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf. If respondents, without requesting a permit, had commenced peat-mining operations on the relevant tract, the decision whether to initiate an administrative enforcement action would have been entrusted to the EPA.

will do so if new information warrants. Corps, Regulatory Guidance Letter No. 05-02, ¶ 1 (June 14, 2005). And the EPA is not legally bound by Corps jurisdictional determinations because the EPA has final authority, as between the two agencies, to construe the scope of the CWA's coverage. See Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197, 202 (1979). The Corps' issuance of a negative jurisdictional determination therefore would not preclude the EPA from instituting an enforcement action if it believed that CWA-protected waters were present at the relevant site and that the landowner had discharged pollutants into those waters.[3]

Respondents argue (Br. 28-29) that, in an enforcement action for unauthorized discharges, the government might introduce an affirmative jurisdictional determination as evidence of the landowner's know-

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[3] The agencies have established separate practices governing the division of authority in certain rare "special cases" not at issue here, *i.e.*, determinations of jurisdiction made by the EPA in limited circumstances "where significant issues or technical difficulties are anticipated or exist." *Memorandum of Agreement: Exemptions Under Section 404(f) of the Clean Water Act* § III.A (1989), https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act (MOA). The MOA provides that "determinations * * * made pursuant to this MOA or the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program," which also addressed, in relevant part, "special case[]" determinations, "will be binding on the Government and represent the Government's position." *Id.* § VI.A. That statement establishes that an EPA "special case[]" determination will control within the government. The MOA does not address mine-run Corps jurisdictional determinations of the sort at issue here, or suggest that all jurisdictional determinations are legally "binding" on the agencies.

ledge of the CWA's applicability. But, to the extent that the defendant's knowledge of particular waters' CWA-protected status is relevant to any liability or penalty issue arising under the Act, the defendant's receipt of an affirmative jurisdictional determination would not conclusively establish that such knowledge existed.[4] The defendant would remain free to argue that, although he knew of the Corps' view that particular waters were covered by the Act, he believed that view to be wrong.

A jurisdictional determination also does not impose legal consequences in citizen suits. Respondents contend (Br. 27) that, in a citizen suit alleging that particular discharges violated the CWA, the plaintiff "can rely on the [affirmative jurisdictional determination] as prima facie evidence of a violation of the" CWA. But while an affirmative jurisdictional determination (like a private consultant's report) might be introduced as evidence in such a suit, it would not alter the plaintiff's burden of establishing each of the elements of a CWA violation, including the presence of waters of the United States. See *Stillwater of Crown Point Homeowner's Ass'n* v. *Kovich*, 820 F Supp. 2d 859, 899 (N.D. Ind. 2011). By the same token, the recipient

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[4] The courts of appeals generally have recognized that, because the status of particular waters as "waters of the United States" is a "jurisdictional element" of a CWA violation, the defendant in a criminal case need not be proved to have known the facts establishing CWA coverage in order to be found guilty of "knowingly violat[ing]" the Act. 33 U.S.C. 1319(c)(2)(A); see, *e.g.*, *United States* v. *Cooper*, 482 F.3d 658, 665-668 (4th Cir. 2007) (Wilkinson, J.). The court may consider the defendant's knowledge of such facts, and of the relevant waters' CWA-protected status, in assessing an appropriate penalty within the applicable statutory range. See 33 U.S.C. 1319(c) and (d).

of a negative jurisdictional determination might introduce it as evidence that any discharge did not occur into waters of the United States, see Corps, Regulatory Guidance Letter No. 08-02, ¶ 2.b(3) (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf (a negative jurisdictional determination "can be used and relied on by the recipient" in defending against a citizen suit), but a negative jurisdictional determination does not preclude the imposition of liability as a matter of law, and the court is not required to give it any particular weight.

c. Respondents assert (Br. 25) that a jurisdictional determination has the "earmarks of final agency action" because it reflects a considered decision made after a relatively formal, structured agency process. But the APA requires finality, not formality. In *Dalton*, for example, the Court held that an official Department of Defense report recommending base closures was not final, despite the extensive formal procedures it reflected, because it was not binding on the President and accordingly had no operative legal effect. 511 U.S. at 469-470; see *Franklin*, 505 U.S. at 797; *Standard Oil*, 449 U.S. at 234, 241-243.

The procedural attributes on which respondents rely—that a jurisdictional determination reflects an "official" rather than "[p]reliminary" view, reached after careful scientific investigation, and that the Corps' regulations describe a jurisdictional determination as "final" (Br. 25)—reinforce the conclusion that the jurisdictional determination represents the consummation of agency decisionmaking and therefore satisfies *Bennett*'s first prong. They do not establish, however, that it has legal effect. See Gov't Br. 33-35 & n.8. Respondents also observe (Br. 25) that a

jurisdictional determination is "valid" for five years.[5] 33 C.F.R. Pt. 331, App. C. But the relevant question is not how long a jurisdictional determination remains valid, but whether it has binding legal effect during that period. For the reasons discussed above and in the government's opening brief, it does not. See pp. 9-14, *supra*; see also Gov't Br. 25-41.

d. A Corps jurisdictional determination thus is analogous to agency communications that inform regulated parties of the agency's view of the legal status of particular private conduct. Although this Court has not had occasion to address the question, the courts of appeals have repeatedly held that such statements are not final agency action because they do not effect legal consequences apart from those already imposed by the statute. See, *e.g.*, *Golden & Zimmerman, LLC* v. *Domenech*, 599 F.3d 426, 432-433 (4th Cir. 2010); see also *Holistic Candlers & Consumers Ass'n* v. *FDA*, 664 F.3d 940, 941-946 (D.C. Cir.), cert. denied, 133 S. Ct. 497 (2012); *New Jersey* v. *United States Nuclear Regulatory Comm'n*, 526 F.3d 98, 102 (3d Cir. 2008); *Independent Equip. Dealers Ass'n*, 372 F.3d at 428; *Air Brake Sys.*, 357 F.3d at 644. Those decisions reflect the recognition that, while agency guidance is likely to influence a regulated party's conduct, that effect on a party's own assessment of its

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[5] The five-year validity period reflects the Corps' conclusion that, once the agency has undertaken the investigation necessary to make the jurisdictional determination, it generally will not be an efficient use of resources to revisit the question whether waters of the United States are present on a particular tract. Absent contrary evidence, the Corps therefore presumes that physical conditions on the site are unlikely to change significantly during the ensuing five years. See Corps, Regulatory Guidance Letter No. 90-06, ¶ 2 (Aug. 14, 1990).

options does not amount to a legal consequence. *Independent Equip. Dealers Ass'n*, 372 F.3d at 428. If agency guidance were immediately reviewable, moreover, agencies would hesitate to devote limited resources to "giving * * * needed advice." *American Fed'n of Gov't Emps., AFL-CIO* v. *O'Connor*, 747 F.2d 748, 754 (D.C. Cir. 1984) (R.B. Ginsburg, J.), cert. denied, 474 U.S. 909 (1985).

Respondents rely (Br. 33-35) on decisions involving agency actions that, unlike jurisdictional determinations, had operative legal effects. In *Frozen Food Express* v. *United States*, 351 U.S. 40, 41-45 (1956), the Court held that an Interstate Commerce Commission (ICC) order identifying the commodities that the ICC deemed to be exempted from regulation under the Interstate Commerce Act was final because it effectively functioned as a rule. The order was functionally equivalent to an "administrative regulation[]" interpreting the scope of the statutory exemption for "agricultural commodities," *Standard Oil*, 449 U.S. at 240 & n.8 (discussing *Frozen Food Express*), and thus "set[] the standard" governing how "an important segment of the trucking" industry would be permitted to do business. *Frozen Food Express*, 351 U.S. at 44. Similarly, the order at issue in *Port of Boston* was final because it determined the extent to which a tariff could go into effect. 400 U.S. at 65-66, 71. A jurisdictional determination has no comparable legal effect.

C. The Asserted Practical Consequences Of A Jurisdictional Determination Do Not Render It Final Agency Action

Respondents argue (Br. 30-39) that a jurisdictional determination's likely practical effect on a landown-

er's decisionmaking is sufficient to render the jurisdictional determination immediately reviewable. That argument lacks merit.

1. When an agency action does not alter the legal regime, even significant practical consequences do not render it reviewable. In *Standard Oil*, the Court held that an FTC complaint finding "reason to believe" that a party had violated the Federal Trade Commission Act was not final, even though it imposed the "substantial" "burden" of defending against the agency proceeding—a burden that entailed significant expense as well as reputational harm. 449 U.S. at 242; see *Air Brake Sys.*, 357 F.3d at 645 ("[A]dverse economic effects accompany many forms of indisputably non-final government action[,] * * * but that does not make the agency's action final."). In *Dalton* and *Franklin*, the Court held that the agency recommendations at issue were non-reviewable because they were not legally binding; the Court did not assess the practical impact those recommendations were likely to have on the President's decisionmaking.

Respondents' arguments illustrate why it would be unworkable to treat the practical incentives created by agency action as a sufficient basis for immediate judicial review. Respondents primarily contend (Br. 16) that immediate review is necessary because the cost of seeking a permit would be prohibitive for them. Even assuming that is an accurate description of their particular circumstances (respondents have not supported those assertions with evidence), it is doubtless not true for all or even most potential dischargers. The vast majority of discharges fall within general permits, and either can be undertaken without providing advance notice to the Corps (and therefore without

expending any resources on a permit request), 33 C.F.R. 330.1(e), or after completing the abbreviated, relatively inexpensive general-permit verification process, 33 C.F.R. 330.1(f). See Gov't Br. 8 (more than 54,000 general-permit verifications issued in 2015, compared with 3100 individual permits and 97 applications denied); *id.* at 47-48. The cost of obtaining an individual permit varies widely based on the circumstances, but it will sometimes be only slightly greater than for a general-permit verification, and even a substantial cost will sometimes be a small percentage of the applicant's planned expenditures for the project. See *id.* at 48. Generalized assertions that permitting costs may exceed an undefined threshold for an unknown number of potential dischargers provide no basis for holding that all jurisdictional determinations are immediately reviewable.

Respondents suggest in the alternative (Br. 37) that the finality analysis "should take into account the facts of this case," including the fact that respondents' own proposed peat-mining activities would require an individual permit. See *id.* at 38, 40. Under that approach, the same jurisdictional determination for the same property might have been treated as non-final if respondents had expressed a desire to undertake a more modest project for which a general permit might apply. Respondents cite no decision in which the Court has analyzed finality in that manner. That approach would also create an evident potential for manipulation, particularly if (as respondents contend, see *id.* at 38) the allegations in a plaintiff's complaint must be taken as true in assessing the practical impact of the challenged agency conduct.

2. In any event, immediate judicial review of a Corps jurisdictional determination would not necessarily provide the certainty respondents seek. A reviewing court's determination that a jurisdictional determination is "arbitrary [and] capricious," 5 U.S.C. 706(2)(A)—*i.e.*, that the Corps' administrative record did not support a reasonable belief that the property contains waters of the United States—would not prevent the Corps or the EPA from gathering additional evidence of CWA coverage and initiating enforcement action based on that evidence.[6] And if the court held that the jurisdictional determination was *not* arbitrary and capricious, the landowner could still argue, in a subsequent civil enforcement action, that the agency had failed to prove by a preponderance of the evidence that the property in question contained waters of the United States.

Allowing immediate judicial review of the Corps' jurisdictional determinations therefore would spawn piecemeal and potentially duplicative proceedings. That prospect might deter the Corps from engaging in an informational practice that is triggered by a landowner's request and is intended to benefit landowners as well as to promote compliance with the CWA.

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[6] Respondents' complaint appropriately recognized that, if judicial review is available, it should be "based upon the administrative record before the Corps at the time the Corps made its decision." J.A. 8. Although respondents requested "[a] declaration that [their] Property is not subject to the CWA," J.A. 26, that relief would be inappropriate even if respondents' suit is allowed to go forward and is ultimately successful. The only question properly before a reviewing court would be whether the Corps' administrative record adequately supported its jurisdictional determination—not whether the relevant tract actually contains waters protected by the CWA.

II. RESPONDENTS HAVE ADEQUATE ALTERNATIVE OPPORTUNITIES TO OBTAIN JUDICIAL RESOLUTION OF CWA-COVERAGE ISSUES

Even if a jurisdictional determination were "final agency action," APA review would be unavailable because a person who disagrees with such a determination has "other adequate remed[ies] in a court." 5 U.S.C. 704. The CWA authorizes the Corps and the EPA to issue permits for discharges that would otherwise violate the Act, and it provides for various forms of enforcement actions against alleged violators. Judicial review of CWA-coverage issues is available in both those contexts. Respondents contend that immediate judicial review of Corps jurisdictional determinations is an essential supplement to those mechanisms. Congress evidently did not share that view, however, since the CWA does not expressly contemplate standalone jurisdictional determinations.

A. Respondents assert (Br. 39-44) that seeking a permit is prohibitively costly. But cf. pp. 17-18, *supra*. That concern provides no basis for second-guessing Congress's evident determination that the permitting process affords an adequate avenue for obtaining pre-discharge resolution of CWA-coverage issues. Respondents also rely on unrepresentative cost figures, see Gov't Br. 47-48, and overlook the fact that lower-cost general permits account for the vast majority of permit grants. And while respondents assert (Br. 40) that they must commission studies costing $100,000 to pursue their own permit application, it is unclear how substantial those costs are in relation to respondents' project as a whole, which contemplates peat-mining on 150 acres of high-value wetlands over a 20-year period. J.A. 27.

Respondents suggest (Br. 46-47) that the Corps will use its control over the duration of the permitting process, and its requests for additional information from the applicant, to "wear down the applicant" until it abandons its permit request.[7] In fact, the Corps uses an iterative process of consultation and information requests so that it may reach a resolution that enables the applicant to implement its project consistent with the CWA and other federal statutes. See 33 C.F.R. 320.4 (Corps balances benefits of the proposed project and private ownership rights with public interest in preserving waters of the United States); Gov't Br. 47-49. That is why permits are rarely denied. In addition, Corps regulations protect applicants by establishing default deadlines and limiting information requests to those "deem[ed] essential." 33 C.F.R. 325.1(e); see 33 C.F.R. 325.2(d).

Respondents argue (Br. 41-44) that it is "[w]asteful and [u]nnecessary" to require landowners to undertake the permitting process even though it "has nothing to do with the question of jurisdiction." But im-

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[7] In 2011, the Corps issued approximately 3600 individual permits, approved approximately 53,000 projects under general permits, modified approximately 3100 existing permits, and determined for approximately 9900 applications that no permit was required. The Corps denied approximately 134 permit applications, and approximately 9700 were withdrawn. Permit denials were infrequent because "[m]ost projects which might otherwise have been denied a permit were modified or conditioned to meet Corps requirements, scaled down to qualify for approval under general permits, or withdrawn." Dep't of the Army, *Annual Report Fiscal Year 2011 of the Secretary of the Army on Civil Works Activities (1 October 2010–30 September 2011)*, at 45-1, http://cdm16021.contentdm.oclc.org/cdm/compoundobject/collection/p16021coll6/id/1548/rec/1.

mediate judicial review of a standalone jurisdictional determination, when a successful permit application could obviate the need for judicial intervention, would consume significant agency and judicial resources without definitively resolving the CWA-coverage issue. See *Standard Oil*, 449 U.S. at 242; see also p. 19, *supra*. Contrary to respondents' argument (Br. 43), the fact that the permit process may involve issues (such as mitigation and timing) that are "irrelevant to the jurisdictional question" does not render it inadequate. Regulated parties often must wait to obtain review of an interlocutory agency order until the conclusion of administrative proceedings that address additional issues unrelated to that order. See *Standard Oil*, 449 U.S. at 241; *Aluminum Co. of Am.* v. *United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (Scalia, J.).

Finally, respondents argue (Br. 46, 50-53) that requiring a landowner to seek a permit "undermines the presumption of reviewability." *Id.* at 50 (capitalization altered). But the "presumption favoring judicial review of administrative action" governs resolution of the question whether a particular statutory scheme precludes review of agency action that satisfies Section 704's criteria. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). The disputed issue here, by contrast, is whether a jurisdictional determination falls within Section 704 to begin with, *i.e.*, whether it is "final agency action for which there is no other adequate remedy in a court." In *Sackett*, for example, the Court first determined that the compliance order was "final agency action" and that no other adequate judicial remedy existed, without applying any presumption in favor of review. 132 S. Ct. at

1371-1372. The Court then applied the presumption in considering whether the CWA precluded judicial review of the order. *Id.* at 1372-1373.

B. A recipient of an affirmative jurisdictional determination who elects to proceed with discharges may also obtain judicial review of the CWA-coverage issue if the government institutes an administrative penalty proceeding or judicial enforcement action, or if an aggrieved private plaintiff commences a citizen suit. Respondents argue (Br. 53-56) that those avenues for review are inadequate because the landowner may face steadily accruing statutory penalties if the court ultimately concludes that a CWA violation has occurred. See 33 U.S.C. 1319(d); *Sackett*, 132 S. Ct. at 1370. But a person who discharges without a permit would run that risk even if it had not received a jurisdictional determination, or if the Corps had never adopted the practice of furnishing such determinations upon request.

C. The adequacy of existing remedies is particularly clear when the two mechanisms described above are considered in tandem. By invoking the permitting process, a landowner can obtain judicial review of CWA-coverage issues without engaging in potentially unlawful discharges, and thus without subjecting itself to possible penalties if its view of CWA (non-)coverage is ultimately rejected. Alternatively, a landowner that wishes to avoid the administrative requirements of the permitting process can discharge without a permit and argue in any enforcement action that its discharges did not violate the Act. Respondents claim an entitlement to a third judicial-review mechanism that combines the most attractive (to the landowner) features of the two existing avenues, by allowing pre-

discharge review without prior recourse to the permitting process. Respondent identifies no sound basis for concluding, however, that the existing modes of review, taken together, are less than "adequate."

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2016

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES COMPANY, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[*]

Amici curiae represent a broad cross-section of the Nation's farming, ranching, energy, mining, construction, and manufacturing sectors.

The *American Farm Bureau Federation* (AFBF), a not-for-profit, voluntary general farm organization, was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing about 6 million member families.

The *American Petroleum Institute* is a nationwide, non-profit trade association that represents over 650 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers.

The *Associated General Contractors of America* (AGC) is the leading trade association in the construction industry, representing more than 26,000 firms engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. AGC and its nationwide network of 92 chapters have sought to improve and advance the interests of the construction industry for nearly a century.

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[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties' blanket consents to the filing of *amicus curiae* briefs have been filed with the Clerk's office.

The *National Association of Manufacturers* (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The *National Cattlemen's Beef Association* (NCBA) is the national trade association representing U.S. cattle producers, with more than 30,000 individual members and several industry organization members. NCBA represents more than 175,000 of America's farmers, ranchers and cattlemen who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The *National Mining Association* is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

Amici have a profound interest in the outcome of this case because their members own, lease, improve, and conduct their operations on real property. Any

determination that such property contains jurisdictional "waters of the United States" significantly impacts how the land may be used and dramatically raises the cost, and often reduces the feasibility, of constructing critical infrastructure. Operations and improvements that are perfectly lawful on property that does not contain jurisdictional waters become subject to severe criminal and civil penalties and a potential target of third party litigation if jurisdictional waters are disturbed without a Clean Water Act permit.

It is therefore essential that *amici's* members know with certainty whether their property contains jurisdictional waters. But the precise scope of the Clean Water Act, and the land to which it applies, depend on statutory terms that agencies and courts have found difficult to interpret. The resulting uncertainty over the scope of the CWA has unfairly exposed *amici's* members to the risk of civil and criminal liability under the Act. The federal government's broad jurisdictional theory sweeps millions of landowners and operators into the agencies' jurisdiction. The regulated community must be afforded a way to respond, at a definitive but still early point in the process, to overly aggressive jurisdictional determinations.

A jurisdictional determination from the U.S. Army Corps of Engineers is *that agency's* final conclusion as to whether and what jurisdictional waters are present on the land—a conclusion that may be highly contestable in a particular case. Given the great legal and factual uncertainty about what features constitute jurisdictional waters under the CWA, and the cost, delay and disruption involved in seeking a permit, it is of immense importance to

amici and their members that Corps' jurisdictional determinations can immediately be challenged in court. The economic and social costs of delaying review, and the lack of alternative avenues of timely relief, mean that jurisdictional determinations should be subject to immediate judicial review under APA Section 704.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether or not a parcel of land contains "waters of the United States" that are subject to federal regulatory jurisdiction under the Clean Water Act is a question of great practical importance to those who own, use or improve the land. When land is found to be jurisdictional, a host of regulatory obligations are triggered, including the requirement to obtain a "Section 404" permit from the U.S. Army Corps of Engineers before discharging any dredged or fill material into those jurisdictional waters—terms that have been broadly construed by the Corps to prohibit any productive use, improvement, alteration, or repair of property without first obtaining a permit. Using the land without a permit risks draconian criminal and civil penalties in government enforcement actions, or private enforcement litigation from environmental or neighborhood activists.[1]

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[1] Liability under the CWA's civil enforcement provisions is strict; there is no requirement of negligence, much less of *mens rea*. See, *e.g.*, *United States* v. *Sargent City Water Res. Dist.*, 876 F. Supp. 1081, 1088 (D.N.D. 1992) (civil enforcement action against county, contractor, and engineer for performing or having "responsibility for or control over" drainage repair project); *United States* v. *Board of Trs.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (civil enforcement action against community college board of trustees and contractor for stormwater drainage

The Corps has established a process by which landowners or operators can obtain an official "jurisdictional determination" of whether a particular land or water feature falls within federal jurisdiction under the CWA. Jurisdictional determinations made by the Corps convey the government's final and conclusive assessment of the jurisdictional issue; they are binding on the Corps and may be relied on by regulated entities for five years. The government contends, nevertheless, that these jurisdictional determinations are not subject to judicial review because they are not "final agency action" and because parties aggrieved by such determinations can obtain "adequate" judicial review of the jurisdictional issue at a later time.

This Court should reject both of those assertions. Jurisdictional determinations give rise to substantial legal consequences for landowners and operators: they announce a formal government determination of CWA jurisdiction, they expose owners and operators to drastic criminal and civil liabilities under the CWA, and they effectively force owners and operators into the costly and time-consuming permit process. Such consequences are the hallmark of "final agency action."

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project; civil liability is "strict"). Landowners and operators who discharge dredged or fill material without a permit may incur substantial civil penalties, including civil fines of up to $37,500 per violation per day. Pet. Br. 9 n.4. Negligent violations of the Act carry prison terms of up to one year. 33 U.S.C. § 1319(c)(1). Penalties increase for multiple negligent violations, see *id.*, and for "[k]nowing" violations, to include fines of up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2).

In light of these weighty consequences, no alternative to immediate judicial review is "adequate." Adequacy in this context depends upon practical considerations—and it is decidedly impractical to require a landowner and operators to jump through the gold-plated hoops necessary to obtain a CWA permit that they believe the law does not require, or alternatively to flout the Corps' jurisdictional determination by proceeding with land-use plans or improvements and waiting to be sued, risking massive criminal and civil penalties. For a landowner or operator faced with an adverse jurisdictional determination, therefore, the only "adequate remedy in a court" is immediate review of the jurisdictional determination itself.

ARGUMENT

The Administrative Procedure Act authorizes judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Jurisdictional determinations unquestionably fit that description. As respondents explain in their brief (at pp. 18-39), jurisdictional determinations are "final" agency actions within the meaning of the APA. They also have immediate and severe consequences for landowners and operators. These significant consequences mean that anything short of prompt judicial review is inadequate to protect landowners' rights.

A. Fundamental fairness requires that landowners have an adequate and timely means to challenge final CWA jurisdictional determinations

Fundamental fairness, as this Court has said time and again, requires giving a party aggrieved by

government action the "opportunity to be heard at a meaningful time." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted). For individuals or businesses that receive a jurisdictional determination from the Corps finding that their land is subject to federal jurisdiction under the Clean Water Act, the only "meaningful time" for judicial review is *right away*. The significant practical consequences of an adverse jurisdictional determination make the notion of delayed judicial review intolerable.

Jurisdictional determinations "alter the legal regime to which" a landowner or operator "is subject." See *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997). To begin with, jurisdictional determinations announce the government's conclusive assessment of whether particular land- and water-features qualify as "waters of the United States" within the meaning of 33 U.S.C. § 1362(7). A jurisdictional determination is, in other words, "an official Corps determination" as to whether waters of the United States are "present or absent" and "precisely identifies the limits of those waters." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations, at 1 (June 26, 2008), perma.cc/6ASN-PPLF. Such a determination may be relied upon by regulated parties for up to five years, and a landowner can use a negative determination as a defense to a citizen suit under the CWA. *Id.* at 2. For landowners, a new jurisdictional determination is a restriction on activities that would otherwise be lawful.

It is not surprising, therefore, that the Corps' own regulations refer to a jurisdictional determinations as a "final agency action." 33 C.F.R.

§ 320.1(a)(6). Far from simply providing informal guidance on the question of jurisdiction, such determinations set out a formal, binding government position that the agency is unlikely ever to change. Landowners and operators have a limited right to an administrative appeal (see *id.* pt. 331), but once any administrative appeal is exhausted, they have no further recourse except to seek review of the determination in court.

The United States denies that jurisdictional determinations are significant, contending that "[t]he CWA itself, not [a] jurisdictional determination," is what imposes legal obligations on a landowner or operator. Pet. Br. 27. In the government's view, jurisdictional determinations are ministerial actions in which the Corps simply puts a formal stamp on a result that the CWA clearly ordains in its own right.

That is not even close to the truth. The meaning of the "navigable waters" that are the "waters of the United States" remains subject to debate even after three rulings of this Court addressing those terms.[2] EPA's and the Corps' latest effort to define these statutory concepts—in a rule currently stayed by judicial order—is so vague and expansive that it has been challenged by a majority of the States, every national business group with an interest in land use, and a host of environmental organizations. See p.21 n.8, *infra*.

Without question, the Corps exercises considerable discretion every time it makes a jurisdictional

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[2] See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos* v. *United States*, 547 U.S. 715 (2006).

determination because, as this Court has recognized, "'the definitions [the Corps] use[s] to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (plurality opinion). Thus, the Corps asserts broad discretion to flesh out how vaguely-defined regulatory concepts apply in specific cases. In exercising that discretion, the Corps not only identifies the physical boundaries of CWA jurisdiction, but it shapes the legal limits of its discretion, case by case. The Corps' jurisdictional determinations create new legal encumbrances on land where none existed before, and they often test the boundaries of federal authority under the CWA.

In this way, jurisdictional determinations immediately alter the legal position of the regulated parties who receive them. To begin with, the jurisdictional determination authoritatively resolves an issue (whether the government considers the property to contain "waters of the United States") that before was uncertain and that is guided only by vague agency rules and other edicts, the application of which is often highly contestable in specific cases. The Corps' official determination thus makes concrete what before could only be guessed at by the landowner or operator.

In addition, the Corps' determination puts the landowner or operator on notice that the land contains "waters of the United States" subject to the CWA and to Corps and EPA regulation, and where those waters are located. That notice affects the penalties for using or developing the land without first seeking a permit. Courts must take a defendant's "good-faith" into account when determining the amount of a civil penalty (33 U.S.C. § 1319(d)), and the government would surely argue that a

landowner or operator who proceeded with development in the face of an adverse jurisdictional determination lacked good faith. The government could also contend that the violation of the CWA was "knowing," a charge that exposes the landowner or operator to increased fines and a lengthy jail sentence. *Id.* § 1319(c)(2); see p.4 n.1, *supra*.

It is no answer to say, as the government does (Pet. Br. 32), that a jurisdictional determination is merely evidence, and that its "evidentiary weight in [a] future proceeding" is "contingent" rather than "concrete." The Court made clear in *Sackett* that an agency action need not "impose a self-executing sanction" on a party in order for its consequences to be significant. *Sackett* v. *EPA*, 132 S. Ct. 1367, 1373 (2012). There, the CWA compliance order at issue did not directly impose sanctions on the landowners; it only increased the "*potential* liability" they faced, if and when EPA chose to "drop the hammer" and bring an enforcement proceeding. *Id.* at 1372 (emphasis added). Yet this Court held unanimously that this increased exposure was a legal consequence warranting immediate review. The same is true here.[3]

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[3] The government asserts that the prospect that a formal jurisdictional determination will increase the penalties assessed upon a landowner "does not distinguish it" from an "informal" agency statement or "a private consultant's report," both of which could also be "offered as evidence" in support of increased penalties. Pet. Br. 32-33. That comparison does not hold water. Although a private report or informal agency guidance might well serve as evidence that a landowner acted "knowingly" or without good faith, neither is nearly as probative on that issue as a jurisdictional determination by the Corps—an official agency pronouncement of jurisdiction, rendered after a detailed review and likely tested in the crucible of an administrative appeal.

Furthermore, as we explain in greater detail below (Part B.2, *infra*), the increased risk of criminal or civil liability after an adverse jurisdictional determination means that making productive use of or improvements to the land without a permit is utterly unrealistic. The true consequence of an adverse determination is that the landowner or operator *must* apply for and obtain a permit in order to use or develop the land. That is no trivial matter. As this Court itself has observed, the permitting process imposes massive burdens, requiring months and often years to complete, at a cost of tens or hundreds of thousands of dollars—"not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 721 (citing David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002)).[4]

The prospect of dealing with CWA permitting is often enough to sink a development project altogether (including by making project financing impossible to obtain). Indeed, landowners and operators often abandon efforts to obtain a permit (or permit denial) because initial consultation with the

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[4] CWA permittees are often required to take action to "offset environmental losses resulting from unavoidable impacts to waters of the United States." 40 C.F.R. § 230.93(a)(1). The Corps estimates the cost of mitigation at between $25,000 and nearly $50,000 *per acre* for wetlands covered by the CWA. See Envtl. Protection Agency & U.S. Army Corps of Eng'rs, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, at 17 (Mar. 2014), perma.cc/434R-4XFA. In our experience, when no mitigation bank is available, per acre costs are considerably higher than that.

Corps leads them to conclude that no permit—or no economically feasible permit—will be issued and that the expense of a permit application will be wasted. Predictably, the burdens of permitting mean that property with designated wetlands is less valuable. See John E. Reynolds & Alex Regalado, *The Effects of Wetlands and Other Factors on Rural Land Values*, APPRAISAL J., April 2002, at 190 (the presence of wetlands has a "significant negative impact on rural land prices").

In short, an adverse jurisdictional determination has an immediate and serious impact on a landowner or operator. It binds regulators to an official position that the property is subject to CWA jurisdiction, leaving owners and operators with limited options. They cannot engage in any activities on the land that might result in a discharge to jurisdictional waters, without risking CWA penalties, unless they first undertake a slow, uncertain, and expensive permitting process—even when they have grounds to believe a permit is legally unnecessary. The principles of fundamental fairness embodied by Section 704 of the APA do not permit the government to put landowners and operators in a legal straitjacket like that, without the option of immediate judicial review.

B. Regulated entities have no adequate method of challenging jurisdictional determinations other than APA § 704

1. Whether alternative avenues of review are "adequate" is a practical inquiry

The burdens that follow from an adverse jurisdictional determination do more than show that the determination is a "final" agency action; they also demonstrate that landowners and operators have no

"adequate" alternative to immediate APA review. The government disagrees, insisting that regulated parties have "adequate alternative opportunities to argue in court that their property does not contain CWA-protected waters" because they can either (a) seek a Clean Water Act permit and then obtain judicial review after the Corps renders a decision on the permit or (b) use their land without a permit and raise the issue of jurisdiction in a subsequent enforcement proceeding. Pet. Br. 45. Those alternative means of obtaining judicial review of the antecedent jurisdictional determination are "adequate," in the government's view, irrespective of whether they are actually feasible.

The government is wrong. As *Sackett* makes clear, the bare existence of alternate avenues of judicial review does not mean that those alternatives are "adequate." To satisfy that statutory standard, alternative avenues of review must be practical, not merely theoretical—they must in fact be capable of granting meaningful relief.

In *Sackett*, the petitioners could have obtained judicial review of whether their property contained "waters of the United States" by starting construction of their house and waiting for EPA to bring an enforcement action against them. But the Court held that this was not an adequate avenue for judicial review because of the practical hardship that would result. As the Court pointed out, the Sacketts could not initiate the enforcement process themselves, and they risked incurring massive additional fines and penalties each day they waited for EPA to act. 132 S.

Ct. at 1372.[5] Thus, as the court of appeals correctly observed in this case, an alternative remedy cannot be considered adequate if requiring parties to rely on the alternative would leave them "unable, *as a practical matter*, to challenge [an agency's] assertions." Pet. App. 15a (emphasis added).

This focus on whether alternative routes to judicial review are practical and meaningful accords with the way the Court has addressed the adequacy of judicial review in other contexts. In *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967), for example, the Court looked to practicalities in evaluating whether pre-enforcement review of certain cosmetics regulations was appropriate under the ripeness doctrine. Requiring the regulated parties to violate the regulations and raise their legal challenges as a defense in a later enforcement proceeding was an "inadequate * * * alternative," the Court reasoned, because it was "beset with penalties and other impediments." *Id.* at 172. What is more, requiring the regulated parties to submit their products for premarket clearance was unacceptable because the resulting costs of testing and recordkeeping would be "substantial" and cause the parties "irreparable injury." *Id.* at 173 (quotation marks omitted). In light of those dire practical consequences, this Court concluded that immediate judicial review was appropriate under the ripeness doctrine. *Id.* at 174.

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[5] The Court in *Sackett* observed that, in that case, the government, "to its credit, [did] not seriously contend that other available remedies alone foreclose review under § 704." 132 S. Ct. at 1372. The government does not persuasively explain why the possibility of later judicial review is any more meaningful here than it was in *Sackett*.

In fact, given the clear analytical overlap between the two legal tests, several courts of appeals expressly treat the question of "hardship" for purposes of the ripeness doctrine and "adequacy" under the APA as fungible inquiries. See, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *U.S. EPA*, 587 F.2d 549, 559 (2d Cir. 1978); *Fort Sumter Tours, Inc.* v. *Andrus*, 564 F.2d 1119, 1123 (4th Cir. 1977) (applying ripeness criteria to analyze reviewability under the APA). That makes sense, because "[t]he granting of prompt court consideration on the basis of hardship is obviously supported by the APA's provision for review of final agency action for which there is no other adequate remedy in a court." *Nat'l Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 696 (D.C. Cir. 1971).

A practical approach to the adequacy question under the APA finds further support in this Court's *Ex parte Young* doctrine. In that context, the Court has admonished that courts "normally do not require plaintiffs to bet the farm * * * by taking the violative action before testing the validity of the law," because that is not "a meaningful avenue of relief." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (citations and quotation marks omitted). Yet that is precisely what declining APA review of jurisdictional determinations requires of landowners and business operators: betting the farm—sometimes literally—by taking a violative action before testing the validity of the determination. Judicial review under such circumstances is "illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co.* v. *Georgia*, 235

U.S. 651, 661 (1915). That describes the situation here exactly.

The consistent principle underlying this Court's precedents is that alternate avenues of judicial review are *not* adequate when they impose substantial practical costs and other obstacles to meaningful relief. There is no reason why the rule should be any different in the APA context.

2. The practical consequences of an adverse jurisdictional determination make any alternative mode of review inadequate

The two alternatives to immediate review of a jurisdictional determination that the government relies upon—seek a CWA permit and then litigate the Corps' jurisdiction to make the permit decision, or use the land without a permit and litigate jurisdiction in the enforcement proceeding that follows—are ones that only a bureaucrat would find satisfactory. To landowners and business operators like *amici's* members, they are so impractical as to be largely meaningless.

a. The government suggests that a landowner or operator who receives an adverse jurisdictional determination should seek and either obtain or be denied a CWA permit, and then should challenge agency jurisdiction to make that permit decision. But a permit challenge is a manifestly unfair burden to place on the shoulders of a person who contends that the permit process is unnecessary in the first place because the federal government lacks CWA jurisdiction.

In arguing otherwise, the government pretends that the permit application process under the CWA

is simple, quick, and economical. This Court knows better.

In *Solid Waste Agency of Northern Cook County*, 531 U.S. 159, this Court held that the Corps had improperly asserted jurisdiction over isolated ponds located on an abandoned strip mine on which a coalition of 23 municipalities, representing 700,000 residents, planned to construct a balefill as part of a comprehensive regional effort to address solid waste disposal. SWANCC obtained all necessary Illinois and local government permits approving the balefill. But after the Corps made an affirmative jurisdictional determination in November 1987, SWANCC sought a federal permit to proceed with the project.

The complexities of compiling the permit application meant that SWANCC's application was not filed until February 1990. After the Corps denied the permit, SWANCC was forced to file an amended application, which was denied again by the Corps in July 1994. The Corps' record in the permit proceedings was 47,000 pages long, reflecting what the government conceded was "a very complex inquiry." Tr. of Oral Argument at 18, 40-41, 43, *SWANCC* v. *U.S. Army Corps*, 531 U.S. 159 (2001) (No. 99-1178). Nearly seven years of litigation ensued before this Court held that the Corps' jurisdictional determination had been unlawful from the start. Ultimately, the 14-year delay and tens of millions of dollars in costs that resulted from the Corps' illegal jurisdictional determination doomed the municipalities' balefill project, which was never built. See Thomas W. Merrill, *The Story of SWANCC*, in ENVIRONMENTAL LAW STORIES 283 (Richard Lazarus ed., 2005).

SWANCC is no outlier case. The Corps' rules for evaluating individual permit applications ensure that the individual permit process for a project of *any* size will be time-consuming and expensive. To obtain a permit under the CWA, an applicant must first secure a certificate from the State that the proposed discharge will comply with state water quality standards. 33 U.S.C. § 1341; 33 C.F.R. § 320.4(d). The Corps then makes its own independent determination whether to grant a permit and what conditions to impose, based on its "evaluation of the probable impacts * * * of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a). That inquiry involves the Corps' "weighing * * * all those factors which become relevant in each particular case." *Ibid.*

That vague "all factors" standard requires applicants to hire consultants to address every facet of the "public interest": a term which the Corps says encompasses "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people." 33 C.F.R. §320.4(a)(1).[6] The Corps even evaluates "the relative extent of the public and private need for the proposed structure or work" (*id.*,

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[6] A CWA permitting requirement may also trigger the need to complete a National Environmental Policy Act environmental review (such as an environmental assessment or environmental impact statement) and an Endangered Species Act Section 7 consultation, adding additional uncertainty, delay and cost.

§320.4(a)(2)(i))—an inquiry which invites the Corps to substitute its own views of the social value of a project for those of state and local authorities that have already approved it. *But see, e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982) (land use planning "is perhaps the quintessential state activity").

The Corps' open-ended standards mean that it can take months or even years for a landowner or operator simply to *put together* a permit application —delays the government tellingly excludes from its own assessment of the burdens of the permit process. See Pet. Br. 47 n.10.[7] And that says nothing of the months or years longer that it takes to receive a permit decision (timing within the sole control of the Corps), or the commonplace occurrence that the initial permit application is rejected and the applicant has to go through the entire process again with a revised application, as happened in *SWANCC*.

Unbowed, the government takes the position that the CWA makes the permit process the "primary avenue of obtaining judicial review of a jurisdictional determination," which reflects a congressional judgment that should not be "second-guessed." Pet. Br. 45-46. That claim misses the point. The question here is whether the avenue for judicial review provided as part of the CWA is "adequate" within the meaning of the separate statutory provisions of the APA. What Congress intended under the CWA does not shed light on what it intended under the APA.

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[7] The specific burdens of the permit application process are detailed at Brief Am. Cur. of the American Farm Bureau Fed'n, *et al.*, *Sackett* v. *EPA*, No. 10-1062, at 23-34 (Sept. 2011), https://perma.cc/59RF-YX3W.

That is especially so because "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into voluntary compliance without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Sackett*, 132 S. Ct. at 1374 (quotation marks omitted).

The government itself appears to recognize that the CWA's delayed judicial remedies are inadequate as a practical matter. The necessary conclusion underlying the Corps' decision to create the jurisdictional determination regime in the first place is that it would be unfair to force parties to obtain and then challenge permits, just to obtain rulings on the agencies' jurisdiction. And before this Court, the government freely acknowledges that it is "understandable [why] persons in respondents' position would prefer a pre-permit, pre-discharge judicial ruling on the CWA coverage issue." Pet. Br. 50.

b. The government's second suggested alternative to immediate judicial review—that a landowner or operator should simply proceed with development or other use of the land without a permit and then raise the issue of jurisdiction in the ensuing enforcement proceeding—is even more impractical. See *Sackett*, 132 S. Ct. at 1374 (rejecting the Corps' argument that the Sacketts had to await enforcement proceedings to "challenge * * * the EPA's authority to regulate their land under the Clean Water Act") (Ginsburg, J., concurring).

First, EPA's and the Corps' definitions of "waters of the United States" are vague and uncertain. They make it impossible to be sure, in many cases, whether a feature—which may be ephemeral or his-

toric and not observable, or only very distantly and indirectly linked with any navigable water—will be treated by the Corps as a water of the United States. That leaves "regulated entities * * * to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).[8]

Second, if land is subject to CWA jurisdiction, most activity on the land risks being characterized by the Corps as a violation. The Corps' conception of activity that involves an "addition" of pollutants that violates the Act if done without a permit is extraordinarily expansive. Even "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland" might "'degrade'" the wetland "within the meaning of [the Corps'] rule." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). Although the Corps will exercise its discretion not to regulate these types of activity so long as it concludes their adverse effects are "de minimis" (who knows what that means?), it has emphasized that "the threshold of adverse effects for the de minimis exception is a very low one" and that much less than a significant impairment or degradation of a wetland will be a violation of the Act. *Ibid.* Most landowners and operators, contem-

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[8] EPA and the Corps issued a regulation in July 2015 purporting to "clarify" the meaning of "waters of the United States." 80 Fed. Reg. 37,054, 37,055 (June 29, 2015). *Amici* have challenged the agencies' June 2015 rule, in part on grounds that it violates the Fifth Amendment's prohibition on vague criminal laws. See *American Farm Bureau Federation, et al.* v. *U.S. EPA*, No. 3:15-cv-165 (S.D. Tex. July 2, 2015); *American Farm Bureau Federation, et al.* v. *U.S. EPA*, No. 15-3850 (6th Cir. Aug. 6, 2015). Implementation of the rule was stayed nationwide by the Sixth Circuit. See Pet. Br. 16 n.5.

plating the risks, will simply refrain from any productive use of the land at all.

Third, the costs of an easily-made mistake—of not recognizing that the Corps would claim that a particular feature is a "water of the United States," or of engaging in some otherwise innocent activity on that land that the Corps might treat as an impermissible discharge—can be crippling. Civil penalties are $37,500 *per day per violation*. And a single day's activities may be treated by the Corps as involving multiple violations. In one case, the Ninth Circuit upheld EPA's imposition of separate CWA penalties for each of 348 passes of a deep plow through swales and seasonal drainages covering just 2 acres of a 8,400 acre farm and ranch, resulting in a total penalty of $1.5 million. *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813 (9th Cir. 2001), aff'd by an equally divided Court, 537 U.S. 99 (2002). See also Br. for Petitioner at 15, 46-50, *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (No. 01-1243).

Civil penalties are not the only risk—the CWA authorizes criminal sanctions as well. A knowing criminal violation carries fines of up to $100,000 per day and six years imprisonment. 33 U.S.C. § 1319-(c)(2). Even a *negligent* violation can bring heavy fines and two years in prison. See p.4 n.1, *supra*.

Given the dire consequences of violating the Act, the government's blithe assertion (Pet. Br. 16) that a landowner or operator "may discharge without a permit if it is sufficiently confident" of the law and the facts is frankly absurd. Given the intentional vagueness of the agencies' regulations, the breadth of discretion claimed by the Corps, and the uncertain legal rules governing this area, it is the rare land-

owner or operator that would ever feel truly confident in its (or its consultants') assessment that the property contains no waters of the United States. And aside from that, few rational decision-makers would be willing to accept *any* risk of an adverse judgment, no matter the level of their confidence, in the face of crippling fines and jail time.

3. Judicial review of jurisdictional determinations will conserve party and agency resources and further the development of the law

The government makes its own practical argument against allowing immediate judicial review. It points to the large number of jurisdictional determinations issued each year and contends that allowing judicial review will require the Corps to litigate the validity of each one, "impos[ing] a substantial further strain on the Corps' limited resources." Pet. Br. 24. That prediction might be troubling if there were anything to it. But there is not.

Allowing landowners and operators to challenge jurisdictional determinations immediately would not open the floodgates of litigation in the way the government suggests. In those "easy" cases where the Corps' jurisdictional determination rests on sound analysis, those subject to the determination are much more likely to seek a permit, offer mitigation, and cooperate with the Corps than to pursue costly litigation that will cause delay and that is unlikely to be fruitful. And when a project fits within a nationwide or other general permit—which cover many types of small projects—a landowner or operator will usually choose to comply with the general permit as the most economical and efficient course, rather than litigate jurisdiction.

The only cases in which the lower court's rule would actually introduce or accelerate litigation is when a landowner seeks an individual permit to discharge and the Corps' claim of jurisdiction is sufficiently dubious, and the costs and delay involved in permitting are large enough, to warrant the burden of litigating against the United States government. Such cases will be few and far between. And litigation in *those* cases will have significant *benefits*: it will lead to much-needed judicial guidance on the scope of CWA jurisdiction, which will assist regulators and the regulated alike. Cf. *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008) (courts must "have the final say on the scope of the CWA"). Judicial testing of the Corps' more aggressive assertions of jurisdiction at an early stage will delineate more clearly for all concerned which waters truly are "waters of the United States." Such clarity is good for everyone, including the petitioner here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,
v.
HAWKES CO., INC., et al.
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR
CALIFORNIA FARM BUREAU FEDERATION,
CALIFORNIA CATTLEMEN'S ASSOCIATION,
CALIFORNIA BUILDING INDUSTRY ASSOCIATION,
BUILDING INDUSTRY
LEGAL DEFENSE FOUNDATION, &
CALIFORNIA BUSINESS PROPERTIES ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI[1]

The California Farm Bureau Federation (CFBF) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. CFBF is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 53,000 agricultural, associate, and collegiate members in 56 counties. CFBF strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Many of CFBF's members farm on lands that contain areas which the U.S. Army Corps of Engineers (Corps) maintains are jurisdictional under the Act, and rely on the exemptions and exclusions for farming in the Act and its implementing regulations.

The California Cattlemen's Association (CCA) is a mutual benefit nonprofit corporation organized in 1917 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the beef cattle industry. Beef cattle producers operate on over 38 million of California's 100 million

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[1] No counsel for any party authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person (other than the *amici curiae*, its members, or its counsel) made any such monetary contribution. Blanket consents from counsel for all parties to the filing of briefs amicus curiae are on file with the Clerk.

acres. They frequently will graze cattle on lands that are also used for crop production. Beef cattle producers also operate on lands that contain areas which the Corps maintains are jurisdictional under the Act, and rely on the exemptions and exclusions for farming in the Act and its implementing regulations.

The California Building Industry Association (CBIA) is a statewide, non-profit trade association representing over 3,000 businesses and employing more than 100,000 people involved in all aspects of residential and commercial construction. Its members include homebuilders, architects, engineers, sales agents, title and escrow companies, general and specialty contractors, lenders, attorneys, land planners, material suppliers, insurers and land developers. Collectively, CBIA's members are responsible for producing approximately 80% of all new homes built in California annually.

The Building Industry Legal Defense Foundation (BILD) was formed in 1987 as a California mutual benefit nonprofit corporation whose purposes are to monitor legal developments and to participate in litigation designed to improve the business climate for the building industry. BILD is a wholly owned subsidiary of the Building Industry Association of Southern California, Inc. Together, they represent more than 1,100 member companies.

California Business Properties Association (CBPA) is the designated legislative advocate for the International Council of Shopping Centers (ICSC), the Commercial Real Estate Developers Association (NAIOP), NAIOP of California, the Building Owners and Managers Association of California, the Retail Industry Leaders Association, the Institute of Real Estate Management, the Association of Commercial

Real Estate – Northern and Southern California, the National Association of Real Estate Investment Trusts and the California Association for Local Economic Development. CBPA currently represents over 10,000 members, making it the largest consortium of commercial real estate professionals in California.

The members of CBIA, BILD, and CPBA routinely engage with the Corps on Clean Water Act issues, including jurisdictional determinations.

All of the amici are concerned about the vagueness of the Clean Water Act, and with the difficulty in structuring their activities so as to comply. In the Ninth Circuit, that uncertainty is compounded by the fact that approved jurisdictional determinations are not reviewable in court because they are not considered final agency action. (*Fairbanks North Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 589 (9th Cir. 2008).)

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act is a penal statute, imposing potentially ruinous criminal sanctions and civil penalties on landowners accused of violating it. Due process requires that penal statutes "define the criminal offense with sufficient definite-ness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforce-ment." (*Skilling* v. *United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)), internal brackets, numbers, and quotation marks omitted.) But ordinary people have practically no way of understanding in advance whether their activities would violate the Act, or lead to arbitrary or discriminatory enforcement by the Government or other private parties.

The Corps' litigation position would make this constitutional problem even worse. The Corps' regulations prescribe that approved jurisdictional determinations (JDs) are "final agency action", and the Corps has explained that the public can "rely on" them. But here, the Corps argues that approved JDs are not final agency action, and they should not be relied on. It even takes the position that landowners who rely on an approved JD, and are careful to avoid any property identified as jurisdictional, can still be subject to penal enforcement action if the Corps or any member of the public later asserts that additional jurisdictional areas exist on the property. This only adds to the uncertainty that the Act imposes on landowners.

To help mitigate the constitutional problem that this uncertainty would present, this Court should

interpret "final agency action" to include approved JDs.

ARGUMENT

TO MITIGATE THE POTENTIAL UNCONSTITUTIONAL VAGUENESS OF THE CLEAN WATER ACT AND ITS REGULATIONS, 'FINAL AGENCY ACTION' UNDER THE APA SHOULD BE CONSTRUED TO INCLUDE APPROVED JURISDICTIONAL DETERMINATIONS.

1. The Administrative Procedure Act (APA) "creates a presumption favoring judicial review of administrative action" (*Sackett* v. *EPA*, 132 S.Ct. 1367, 1373 (2012), internal citation and quotation marks omitted.) The APA defines "agency action" to include "relief" (5 U.S.C. 551(13)), and defines "relief", in turn, to include an agency's "grant of ... assistance" (*id.* para. 11(A)).

Is an approved jurisdictional determination (JD) a grant of assistance or other form of agency action? Nine times in its merits brief the Corps characterizes approved JDs as being to "assist" landowners. (Pet. Br. at III, 3, 20, 21 (twice), 32, 34, 43, & 44.) This assistance is not general or informal, as agency brochures or reports might be; rather, it is the result of a formal, individual, site-specific, adjudicatory procedure, based upon an administrative record.[2]

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[2] The regulations governing jurisdictional determinations (only some of which are acknowledged in the Corps' brief) are instructive. They generally authorize Corps district engineers "to *determine* the area defined by the terms 'navigable waters of the United States' and 'waters of the United States'" (33 C.F.R. 325.9, emphasis added), and "the applicability of general permits or statutory exemptions to proposed activities" (33 C.F.R. 320.1(a)(6)). These are to be "*formal* determinations" that "constitute a

This assistance extends beyond just adjudicating jurisdiction under the Clean Water Act. It also includes adjudicating "the applicability of general permits or statutory exemptions to proposed activities" (33 C.F.R. 320.1(a)(6).) The Corps expects the public to "rely on" approved JDs. (51 Fed.Reg. 41,206, 41,207 (Nov. 13, 1986).) This assistance—intended as it is to be relied on by all as a formal adjudication of a landowners' rights and responsibilities under the Clean Water Act—is agency action presumptively subject to judicial review.[3]

It is also "final agency action" for which the APA provides a right to judicial review. (*See* 5 U.S.C. 704.) The Corps' own regulations prescribe that an approved JD is "a Corps final agency action." (33

Corps *final agency action*" (*Id.*, emphasis added.) They are subject to a formal appeal procedure intended to be "independent, objective, fair, prompt, and efficient." (33 C.F.R. 331.1(a).) Landowners are to be notified of their right to appeal, and of their "right to obtain a copy of the administrative record." (33 C.F.R. 331.4.) Appeals are to be reviewed by an officer who had no involvement in the "action being appealed." (33 C.F.R. 331.3(b).) The reviewing officer may call a meeting with the parties "to review and discuss issues directly related to the appeal" (33 C.F.R. 331.7(d).) Decisions on the merits of an appeal must be "in writing" (33 C.F.R. 331.9(b).) Meritorious appeals result in a remand. (33 C.F.R. 331.10(b).)

[3] Approved jurisdictional determinations also qualify as the type of "relief" that is agency action because they constitute the Corps' "recognition of a ... right, immunity, ... [or] exemption" (5 U.S.C. 551(11)(B)), and the "taking of other action on the application or petition of, and beneficial to, a person" (5 U.S.C. 551(11)(C)).

C.F.R. 320.1(a)(6).) Rightly so. It marks the consummation of the Corps' formal process for determining jurisdiction under the Act, and it determines landowners' rights or obligations under the Act, including "the applicability of general permits or statutory exemptions to proposed activities" (*id.*). (*See Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997).) Approved JDs should be subject to judicial review under the APA.

2. Although its regulations prescribe that approved JDs are "final agency action" which, it has explained, "the public can rely on", the Corps' core litigation position here is that its regulations are wrong. (*See* Pet. Br. at 34 n.8.) The Corps argues that approved JDs are not final agency action, largely because they *should not* be relied upon. As the Corps puts it:

> If a particular site in fact contains waters of the United States, but the Corps incorrectly concludes that it does not, unpermitted pollutant discharges into those waters remain unlawful (assuming that no exception to the statutory prohibition applies), even if the Corps' view is reflected in an approved jurisdictional determination. ... [A] negative jurisdictional determination does not cause otherwise-unlawful discharges to be lawful, and it does not insulate the landowner from potential liability ...

(Pet. Br. at 40-41.) In other words, even if a landowner entirely limits his or her operations to the dry land (i.e., non-waters) identified in an approved JD, that landowner could still face an enforcement action by the Government or another private party, on the ground that the approved JD was wrong and additional waters are actually present.

3. The Corps' litigation position, if accepted, would make a serious constitutional problem with the Clean Water Act and its regulations even worse. The Act imposes potential criminal liability on violators (33 U.S.C. 1319(c)), as well as potentially massive civil penalties (*id.*, para. (d)) that are "criminal in nature" (*Tull* v. *United States*, 481 U.S. 412, 418-21 (1987)). "To satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Skilling* v. *United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)), internal brackets, numbers, and quotation marks omitted.) But ordinary people have practically no way of understanding in advance whether their activities would violate the Act, or could lead to arbitrary or discriminatory enforcement by the Government or other private parties.

a. This uncertainty is partly because "[t]he reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act" (*Sackett* v. *EPA*, 132 S.Ct. at 1375 (Alito, J., concurring).) Ordinary landowners typically cannot determine for themselves whether their properties contain features the Corps may assert jurisdiction over. Judge Kelley, in her concurrence below, was quite correct to note that the Act is "unique" in that "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." (Pet. App. at 20a.) Any penal statute that requires ordinary people to hire expert consultants to understand it is constitutionally suspect.

In the arid West, the Corps asserts jurisdiction over vast swaths of land that are bone dry for many months at a time.[4] (During drought years such as these, such dryness can go on for years.) To even begin to understand whether their normally dry properties contain "wetlands" that might be regulated, landowners must hire experts to study the soils, hydrology, and vegetation.[5] Experts must then assess the physical, chemical, and biological relationships those wetlands may have to other lands in the region and to any traditionally navigable

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[4] *E.g.*, U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region*, at 10 (2008) ("Nevada, for example, considered one of the drier states in the country, contains approximately 1.7 million acres of wetlands"), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/trel08-28.pdf.

[5] To delineate wetlands, the Corps uses a 143-page national wetlands delineation manual. (U.S. Army Corps of Engineers, *Wetlands Delineation Manual* (1987), *available at* http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.) That national manual must be read in conjunction with ten regional manuals (U.S. Army Corps of Engineers, *Regional Supplements to Corps Delineation Manual, available at* http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx), and ever-changing lists of wetland soils (U.S. Natural Resource Conservation Service, *Lists of Hydric Soils, available at* http://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/use/hydric/) and wetland plants (U.S. Army Corps of Engineers, *National Wetland Plant List, available at* http://rsgisias.crrel.usace.army.mil/NWPL/). None of this has undergone notice-and-comment rulemaking.

waters downstream.[6] Only then can the experts hazard any guess as to whether the wetlands on a property are jurisdictional under the Act. And if the experts guess wrong, or if other experts disagree, or if the Corps approves the JD but later changes its mind, the Act (as the Corps interprets it) invites anyone to bring a penal enforcement action.

The process can often get even messier. The Corps' local districts frequently apply different standards for determining jurisdiction under the Act. (Resp. Br. at 3, citing General Accounting Office report.) They also frequently apply standards that conflict with authority from this Court, as Hawkes alleges happened here. (Resp. Br. at 38.) Likewise, across much of northern California, the Corps still asserts jurisdiction over waters isolated from traditional navigable waters where "there is a potential connection to interstate commerce".[7] But in *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, this

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[6] The Corps' current guidance on evaluating the physical, chemical, and biological relationships between properties and waters, for purposes of jurisdiction under the Act, is provided in a memorandum jointly published with EPA: *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf.

[7] This quote is taken from deposition testimony of Matthew Kelley, the sole Corps staff person for five large California counties (Tehama, Plumas, Lassen, Shasta, and Modoc counties). It is accessible via PACER at page 38, lines 2-25, of document 115, in *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, case 2:13-cv-2095 (E.D. Cal.) (Kelley Deposition).

Court rejected the Corps' argument that isolated waters could be regulated by the Act, even if those isolated waters are used for commerce that may have interstate effects. (531 U.S. 159, 173 (2001).)

So landowners trying to comply must contend not only with the vagaries of the reach of the Act, but with Corps staff who inconsistently apply, do not understand, or perhaps simply disagree with how this Court has interpreted the law.

b. The activities the Act regulates, even in unambiguously jurisdictional waters, can also be impossible for ordinary people to predict. The Act generally prohibits the "discharge of any pollutant" without a permit (33 U.S.C. 1311(a)), and authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites" (33 U.S.C. 1344(a))—except that no Corps permits are needed for certain exempted discharges (*id.* para. (f)).

The following real-world examples may give some sense of just how confused and unpredictable the Corps' implementation of these provisions can be:

- *Bicycling.* The Corps has taken the position that it "could require a permit to ride a bicycle across a wetland" (*Nat'l Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 n.4 (D.C. Cir. 1998).)

- *Driving.* Corps staff have testified that "[i]t would be pure speculation to know in advance whether you discharge something" as the result of "driving through a wetland".[8]

- *Plowing.* Corps regulations provide that

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[8] Kelley Deposition, *supra*, at page 167, lines 14-23.

"plowing" (defined as "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops") "will never involve a discharge of dredged or fill material." (33 C.F.R. 323.4 (a)(1)(iii)(D).) But the Department of Justice is taking the position, in an enforcement action, that plowing is not "plowing" under this regulation, and thus *does* involve a discharge, if it creates "furrows and ridges" [9] How one could ever plow without creating furrows and ridges the Department of Justice has not ventured to explain.

• *"Normal" Farming Activities.* The Act generally exempts discharges associated with "normal farming, silviculture, and ranching activities" from the permit requirement. (33 U.S.C. 1344(f)(1)(A).) But Corps staff have testified that they "don't have a standard" for what's considered "normal" for purposes of this exemption.[10]

• *Incidental Fallback.* The Corps generally excludes "incidental fallback" from regulation under the Act. (33 C.F.R. 323.2(d)(2)(iii).) Three times the courts have invalidated the Corps' various attempts to define incidental fallback. (*N.*

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[9] United States' Memorandum In Opposition To Duarte's Motion For Summary Judgment On The Counterclaim, at page 13 line 14, Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs, No. 2:13-cv-2095 (E.D. Cal. Nov. 6, 2015), ECF No. 152.

[10] This quote is taken from deposition testimony of James Robb, a senior project manager with the enforcement unit of the Corps' Sacramento District. It is accessible (with its surrounding testimony for appropriate context) via PACER at page 62, line 23, through page 75, line 11, of document 113, in *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, case no. 2:13-cv-2095 (E.D. Cal.).

Carolina Wildlife Fed. v. *Tulloch*, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992) (invalidating 1986 regulations); *Nat'l Mining Ass'n*, 145 F.3d at 1410 (invalidating 1993 regulations); *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, No. 01-0274 (JR), 2007 U.S.Dist.LEXIS 6366, *11-*12 (D.D.C. Jan. 30, 2007) (invalidating 2001 regulations).) Rather than develop a new definition that might pass muster with the courts, the Corps, for more than seven years, has left the term completely undefined. (73 Fed.Reg. 79,641, 79,643 (Dec. 30, 2008).)

Landowners should not be left to guess whether their everyday activities violate the Act. The judgment of the Court of Appeals should be affirmed in order to improve landowners' ability to understand their obligations under the Act.

c. The Corps' litigation position here could also undermine the Act's 'permit shield' (33 U.S.C. 1344(p))—which deems compliance with a permit as compliance with the Act. This is because if, after a JD is approved, anyone can still assert that there are additional jurisdictional waters on a property, then they may also try to assert that any permitted project carried out on that property in the meantime thereby violated the permit and removed the permit shield. (*See* 33 C.F.R. part 325, App. A (Corps may "reevaluat[e]" a permit, and use "enforcement procedures", if "[s]ignificant new information surfaces which this office did not consider" when issuing the permit; permit must also contain "a description of the types and quantities of dredged or fill materials to be discharged in jurisdictional waters").)

4. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If

one of them would raise a multitude of constitutional problems, the other should prevail" (*Clark* v. *Suarez Martinez*, 543 U.S. 371, 380-81 (2005).) Here, interpreting the statutory phrase "final agency action" to include approved JDs would mitigate at least some of the concerns about the potentially unconstitutional vagueness of the Clean Water Act and its implementing regulations.

Interpreting "final agency action" in this way would bar the Government, at least, from relitigating, in an enforcement action, the issues of jurisdiction and "the applicability of general permits or statutory exemptions to proposed activities" (33 C.F.R. 320.1(a)(6)), which were adjudicated to finality in the approved JD. (*See B&B Hardware, Inc.* v. *Hargis Indus.*, 135 S.Ct. 1293, 1303 (2015) ("a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court", internal citation and quotation marks omitted).) Barring the Government from relitigating those issues once a JD is approved would give landowners at least some degree of certainty about which parts of their properties, and which activities carried out on them, are regulated by the Act.

Such an interpretation would also allow landowners to bring court challenges to approved JDs which misapply the law on the reach and scope of the Act. Allowing the courts to correct incorrect applications of the law should bring some needed clarity and consistency to the implementation of the Act.

If, however, the Corps' interpretation prevails here, the tremendous uncertainty that ordinary people already face in trying to understand how they

can structure their conduct so as to comply with the Act would only get worse. For a statute whose violation imposes potential criminal penalties, such uncertainty is constitutionally intolerable. This Court should help mitigate that problem by interpreting "final agency action" to include approved JDs.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a U.S. Army Corps of Engineers determination that certain property contains "waters of the United States" protected by the Clean Water Act constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because it implicates property rights, which are an essential element of a free society.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has applied a two-part analysis when determining the "finality" of an agency action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). This analysis requires: (1) Examining whether the agency action is the "consummation" of the agency's decision-making process rather than being merely tentative or interlocutory in nature. *Id.* at 178 (citations omitted); and (2) inquiring whether the agency action is one in which rights or obligations have been determined, or from which legal consequences will flow. *Id.*

This Court should abandon the second prong of the *Bennett* finality analysis. Prong II is rooted in

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief; the parties' letters granting blanket consent to *amicus* briefs have been lodged with the Clerk. No counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus* made a monetary contribution to fund its preparation or submission.

federal common law and is incompatible with the presumption of judicial review under the Administrative Procedure Act (APA). Further, the question of whether an agency action has become final should be answered by analyzing the text and structure of the APA in order to determine the statute's plain meaning. Under that statutorily faithful test, a jurisdictional determination under the Clean Water Act is clearly a final agency action.

ARGUMENT

I. PRONG II OF THE *BENNETT* FINALITY ANALYSIS VIOLATES THE ADMINISTRATIVE PROCEDURE ACT'S PRESUMPTION OF JUDICIAL REVIEW

The APA's text, structure, and history—confirmed by this Court's precedents—make clear that Congress intended a strong presumption of reviewability when analyzing jurisdiction under the APA. *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012); *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967). Any interpretation of final agency action that requires more than the plain meaning of the APA's text is inconsistent with that presumption. Prong II of the *Bennett* analysis does just that. The test the Court applied in *Bennett* was based on federal common law having its roots—at least as to prong II—in Article III standing, not in the text of the APA. Requiring a prudential test for the effects of an agency's action on top of the minimum standing requirements already addressed in 5 U.S.C. § 702 is burdensome and inconsistent with the APA's presumption of judicial review.

A. The APA Creates a Presumption of Judicial Review of Agency Action

This Court has long recognized that the APA "embodies the basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Abbott Labs.*, 387 U.S. at 140 (citations and internal quotation marks omitted). This presumption extends to "review of final agency action for which there is not other adequate remedy in court." *Id.*; *see also, Sackett*, 132 S. Ct. at 1373 ("The APA, we have said, creates a presumption favoring judicial review of administrative action[.]" (citations and internal quotation omitted). This presumption should not be overcome unless there is a showing of "clear and convincing evidence" to the contrary. *Abbott Labs*, 387 U.S. at 140.

This presumption is supported by the legislative history of the APA, which "manifests a congressional intention that [the APA] cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the APA's generous review provisions must be given a hospitable interpretation." *Id.* at 140–141 (citations and internal quotation marks omitted); *see also*, *Califano v. Sanders*, 430 U.S. 99, 104 (1977) (noting "Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.").

The presumption of judicial review predates the APA. Indeed, "federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (quoting *Bowen v. Mich.*

Academy of Family Physicians, 476 U.S. 667, 670 (1986)). As Chief Justice Marshall explained in 1835:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. 8, 28-29 (1835). *See also, Gutierrez de Martinez*, 515 U.S. at 424–25 (1995) ("judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'") (citing *Abbott Labs*, 387 U.S. at 140).

The text, structure, and history of the APA demand that any statutory construction of 5 U.S.C. § 704 be seen through the lens of a presumption of reviewability. But that is not how the precedent has treated review of final agency action; instead, the Court has accepted a common-law view inhospitable to regulated parties. In the words of one expert:

> *Bennett* severely restricts judicial review in cases where parties are, in any honest assessment of the wording of the APA, aggrieved. Too frequently, the judicial system denies this basic entitlement—

> despite the apparent intent of the APA—to those needing the independent and objective review that only a court can provide.

Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 Admin. L. Rev. 371, 402 (2008).

B. Prong II of the *Bennett* Finality Analysis Is Based on a Common-Law Standing Requirement, Not the APA's Text

The APA already provides for the inquiry into the requisite injury required by Article III to trigger judicial review: "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see also, Doe v. Chao*, 540 U.S. 614, 624-25, (2004) (noting that § 702 "provid[es] review of agency action under the Administrative Procedure Act to individuals who have been adversely affected or aggrieved. That is, an individual subjected to an adverse effect has injury enough to open the courthouse door."); *Ass'n of Data Processing Serv. Orgs, Inc. v. Camp*, 397 U.S. 150 (1970) (connecting § 702 with Article III standing requirements).

But since its enactment in 1946, statutory construction of the APA has been pervaded by judge-made federal common law. *See* Kenneth Culp Davis, *Admin. Law Treatise* 2:18, at 140 (2d ed. 1978); *see also*, Louis L. Jaffe, *Judicial Control of Admin. Action* 329 (1965) (noting that a significant part of judicial review of administrative law comes from common law). In other cases, the APA has simply been ignored. As Prof. Davis noted: "[p]erhaps about nine-

tenths of American administrative law is judge-made law, and the other tenth is statutory Most of it is common law in every sense, that is, it is law made by judges in absence of relevant constitutional or statutory provision." Davis, *supra*, at 140.

In *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939)—a pre-APA holding overruling the "negative" orders doctrine—a telephone company petitioned for review of an order by the Federal Communications Commission. The order classified the company as an interstate carrier subjecting it to certain requirements under the common carrier provisions of the Communications Act of 1934. *Id.* at 127–28. The Court ultimately held that the FCC order re was a final agency action because it was not "a mere abstract declaration regarding the status of the [challenger] under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication." *Id.* at 143. The common-law rationale for the analysis of finality adopted in *Bennett* was described by Justice Frankfurter:

> Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, § 2, U.S. Constitution. Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since

> the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding.

Id. at 131.

Here we see the common-law roots of the *Bennett* finality test. *Bennett*'s first prong of *Bennett* is seen in *Rochester*'s second factor, that the Court is "loath to authorize review of interim steps in a proceeding." *Id.* The second prong comes from considerations of Article III's grant of "judicial power" to determine "Cases" and "Controversies." In other words, the Court must consider whether there is an injury by the agency that gives the Court standing to hear the case. *Id.* Or, as the *Bennett* analysis puts it, "consummation" of the agency's decisionmaking process and whether the action is merely tentative or interlocutory in nature. *Bennett*, 520 U.S. at 178.

Later decisions citing *Rochester* seem to have misread the holding as including two distinct prongs of analysis for final agency action, rather than seeing it for what it was: an Article III standing requirement testing the action's effect coupled with an inquiry into its timing. Unfortunately, most cases citing *Rochester*—including *Bennett*—have given cursory considerations to this precedent by merely citing the case for the later rule. *See, e.g.*, *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (under APA, a relevant consideration in determining finality is whether "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action") (citations omitted); *Pennsyl-*

vania R.R. v. United States, 363 U.S. 202 (1960) ("We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable.") (citations omitted).

The APA's strong presumption of reviewability must enter into any analysis the Court conducts into determining what is a final agency action. If *Bennett*'s second prong is rooted in standing then it is putting a duplicative burden on the aggrieved party to get into court. This runs against the APA's presumption of judicial review. Indeed, if the analysis of what constitutes final agency action requires more than the plain language of the statute, it creates a paradox: The APA favors judicial review of agency action, yet the regulated party must overcome a burdensome prudential federal-common-law standard.

When the Court analyzes whether the agency action determines rights or obligations—or whether legal consequences flow from it—it is really inquiring into whether the aggrieved party has suffered an injury—an inquiry relevant to APA § 702—not any distinct effect produced by the agency action's finality.

II. THIS COURT SHOULD ABANDON *BENNETT*'S PRONG II, APPLY THE PLAIN-MEANING RULE TO THE APA, AND FIND A "FINAL AGENCY ACTION" HERE

A. The Statutory Text Itself Provides a Pragmatic, Straightforward Way to Analyze § 704 of the APA

Amicus fully agrees with the Eight Circuit's holding that "a properly pragmatic analysis of final

agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review." *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015). A straightforward application of the APA's text would be even more pragmatic—and in line with the APA's presumption of reviewability. Applying this approach, the agency action need only be final; it would not require a second burden with no foundation in statutory language.

The first step in an appropriate analysis would be to determine how the APA defines "agency action." While the APA does not clearly define the whole term "*final* agency action," it does define "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The APA in turn defines what each of these separate actions entail. See 5 U.S.C. § 551(4)-(12). Therefore, the first step would be to ask whether the action taken by an agency would fall into one of the above categories.

Second, it may be necessary in some cases to determine what an "agency" is. The APA definition of "agency" reads: "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia." 5 U.S.C. §§ 701(b)(1), 551(1). The office of the President is excluded. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) ("The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that

textual silence is not enough to subject the President to the provisions of the APA.").

Third, the analysis must turn to when an agency's action becomes final. Here, *Bennett*'s first prong is perfectly in line with a final agency action. Because the APA does not define what is final, the Court should look to the plain meaning of the statute. This Court has repeatedly held that "in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citation, brackets, and internal quotation marks omitted); *see also, Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (noting that the plain-meaning rule is a "fundamental canon of statutory construction"); *see also*, e.g., *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (applying the plain-meaning rule); *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (same); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (same). The ordinary meaning of a statutory term can typically be determined by reference to its dictionary definition. *See, e.g., Octane Fitness*, 134 S. Ct. at 1756; *Burrage*, 134 S. Ct. at 887

Webster's dictionary defines "final" as: happening or coming at the end; happening as a result: happening at the end of a process." *Webster's Third New International Dictionary* (2002). This definition parallels *Bennett*'s first prong: the action must mark the consummation of the agency's decision making process, not be merely tentative or interlocutory in nature. *Bennett*, 520 U.S. at 177–78.

Accordingly, a proper judicial review of whether an agency action is final under APA § 704 would

evaluate: (1) whether the agency action falls under the statutory definition of "agency action" under 5 USCS § 551(13); (2) whether the government entity was in fact an agency within the meaning of 5 U.S.C. §, 551(1); and (3) whether the agencies is the "consummation" of the agency's decisionmaking process and not merely tentative or interlocutory in nature.

B. A Jurisdictional Determination Constitutes a "Final Agency Action" Under the Plain Meaning of the APA

Under a textual analysis of APA § 704, a Jurisdictional Determination (JD) is clearly a "final agency action." The U.S. Army Corps of Engineers is an agency within the meaning of 5 U.S.C. § 551(1) as an authority of the U.S. government and does not fall within any of the statutory exceptions.

The JD also is an agency action marking the consummation of the agency decisionmaking process. Petitioners concede in their brief that the first prong of *Bennett* is met. *See* Pet. Brief 25-26. In addition, as Petitioners point out, the Code of Federal Regulations confirms: "A JD is agency determinations for which administrative appeals have been completed represent the consummation of the Corps' decision-making with respect to the presence of waters of the United States on particular property, and reflects the agency's official view." *Id.* (citations omitted).

All three circuit courts—as well as every other district court—to address whether a JD marks the consummation of agency action have agreed that it does. *See Hawkes Co.*, 782 F.3d at 999 (holding that the revised JD "clearly meets the first *Bennett* factor—it was the consummation of the Corps' decisionmaking process on the threshold issue of the

agency's statutory authority") (citations omitted); *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 390 (5th Cir. 2014) (concluding that the JD marks the consummation of Corps decisionmaking process as to the question of jurisdiction); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008) (holding that JD marks consummation of agency decisionmaking process because the Corps "has asserted its ultimate administrative position regarding the presence of wetlands on Fairbanks' property on the factual circumstances upon which the determination is predicated").

Taking this pragmatic straightforward approach of analyzing the plain meaning of the APA's text makes this an easy case. When the Corps issued the JD at issue here, it was a final statement of its position on whether the property owner would be subject to the CWA. When a property owner receives this determination, she should be able to obtain judicial review without having to overcome a burdensome common-law standard that is inapposite to the APA's presumption of judicial review.

CONCLUSION

This Court should affirm the court below.

Respectfully,

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March 1, 2016

No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CAUSE OF ACTION INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF CAUSE OF ACTION INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, Cause of Action Institute ("CA Institute") respectfully submits this *amicus curiae* brief on behalf of itself and in support of Respondents.[1]

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* CA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CA Institute has a particular interest in opposing governmental overreach, protecting the rule of law, and advocating for both government transparency and citizen privacy. Consequently, it brings a unique

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[1] Under Rule 37.6 of this Court, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of Court.

[2] Cause of Action Institute, *About*, http://www.causeofaction.org/about (last visited March 1, 2016).

perspective on the protection of property rights, due process, and hence on the issues presented in this case.

SUMMARY OF ARGUMENT

Administrative law procedures balance the government need for efficient adjudication with the due process rights of affected private parties, including "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, the Court is confronted with an unconstitutional reading of the Administrative Procedure Act ("APA") by the U.S. Army Corps of Engineers (the "Corps").

Delayed judicial review of a revised approved jurisdictional determination creates a serious constitutional problem because it infringes Respondents' due process rights. By construing the Clean Water Act ("CWA") to allow immediate review under the APA, the due process violation resulting from the absence of such review can be avoided. The Court has stressed that liens, attachments, and other similar encumbrances on property warrant immediate due process protection. In this case, the Corps revised approved jurisdictional determination has the same effect as such encumbrances by reducing the value of the land and rendering it unsuitable for its intended legitimate use and economic purpose.

The canon of avoidance and due process require immediate APA reviewability of Corps revised approved jurisdictional determinations. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of

Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

ARGUMENT

I. THE CORPS CONSTRUCTION OF APA SECTION 704 RAISES A SERIOUS CONSTITUTIONAL PROBLEM.

In *Sackett v. EPA*, Justice Alito commented that prolonged inaccessibility of judicial review of an Environmental Protection Agency ("EPA") compliance order under the CWA violated due process. 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) ("In a nation that values due process, not to mention private property, such treatment is unthinkable."). The Court held that the recipient of an EPA compliance order may immediately seek APA review, with the ability to contend that the property is not covered by the CWA. *Id.* at 1370-1371. The Court should similarly determine that the APA's "'strong presumption' favoring judicial review of administrative action" permits Respondents to seek immediate judicial review of the Corps revised approved jurisdictional determination. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)); *Sackett*, 132 S. Ct. at 1373; *see also* 5 U.S.C. § 704. Respondents would then be able to meaningfully challenge the agency conclusion that the property at issue contains "waters of the United States" under the CWA. 33 U.S.C. § 1362(7); *see also* 33 U.S.C. § 1251 *et seq.*

The Court should not be swayed by the Corps argument that the revised approved jurisdictional determination does not satisfy the two-part analysis of APA finality under *Bennett v. Spear* because the

delayed reviewability that would result raises a serious constitutional problem; it would result in a due process violation. *See* Br. at 25 (citing *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). The Court has held that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Avoiding interpretations that would render statutes unconstitutional "reflects the prudential concern that constitutional issues not be needlessly confronted." *Id.* Such an approach "also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* The Court "will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties." *Id.*

II. A DUE PROCESS VIOLATION WOULD RESULT IF IMMEDIATE APA REVIEW OF THE CORPS REVISED APPROVED JURISDICTIONAL DETERMINATION IS UNAVAILABLE.

A due process claim asks whether a party had protected interests and, if so, whether the procedures followed by the government in depriving that party of those interests comported with due process. *See Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001). The initial "inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Determining the amount of process that is due requires a balancing of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *see also Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988) (discussing significance of delay in due process analysis). Respondents articulated a cognizable property interest that has been infringed by the Corps revised approved jurisdictional determination. The process that is due to constitutionally permit such infringement is immediate APA review.

A. Respondents possess a cognizable property interest that has been infringed by the Corps revised approved jurisdictional determination.

The range of "property interests protected by procedural due process extend[s] well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972); *see also Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection"). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164

(1998) (citing *Bd. of Regents of State Colleges*, 408 U.S. at 577). The right of an owner to devote land to "any legitimate use is properly within the protection of the Constitution." *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *see* also *Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (application for a land use permit that is conditioned only upon compliance with zoning ordinance is property interest protected by due process); *Hay v. Andover*, 436 N.W.2d 800, 804 (Minn. Ct. App. 1989) (special use permit); *Zumbrota v. Johnson*, 280 Minn. 390, 395-96 (Minn. 1968) (ownership of building).

Here, Respondents' amended complaint pleads a cognizable property interest in the land at issue. J.A. 7, 9 (Am. Compl. ¶¶ 1, 7).[3] Respondents own the land. J.A. 25 (Am. Compl. ¶ 75). They intend to use the land for the legitimate purpose of peat mining. J.A. 13, 25 (Am. Compl. ¶¶ 27, 77). They intend to process that peat for sale to the golf course industry for use in the construction of greens. J.A. 14 (Am. Compl. ¶ 32). Respondents have pleaded a property interest that is cognizable under due process – ownership, as well as the intention to put their land to a legitimate economic use.

In *Doehr*, the Court addressed the effects attributable to a nonfinal deprivation that could impinge upon the property rights of a landowner. *Doehr*, 501 U.S. at 11. The deprivation in *Doehr*, prejudgment attachment of real estate as surety against a future judgment, "clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit

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[3] Courts accept as true all well-pleaded factual allegations in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

rating; reduces the chance of obtaining [a loan backed by the value of the property]; and can even place an existing mortgage in technical default." *Id.* The amended complaint herein contains allegations that the revised jurisdictional determination wrought similar effects. *See* J.A. 25 (Am. Compl ¶¶ 76-77).

The Corps exercise of jurisdiction has decreased the value of the land. J.A. 25 (Am. Compl. ¶ 76). It has prevented Respondents from putting their land to a viable, legitimate use. *Id.* Respondents are continuously injured because they are precluded from lawfully conducting peat mining and using the land without fear of an enforcement action being brought against them. J.A. 25 (Am. Compl. ¶ 77). Respondents' property interest in the land at issue has been infringed by the Corps because, *inter alia*, the land has diminished in value and cannot be used to mine peat.

B. Immediate APA review is the Process that is Due.

The balancing of Respondents' private interest, the risk of erroneous deprivation with the existing procedure of delaying Article III review, and the governmental interests at stake requires immediate APA review.

Notwithstanding the deprivation of Respondents' property interest, the Corps revised approved jurisdictional determination serves to increase the likelihood that an enforcement action will be brought against Respondents if they put the land to its intended economic purpose. J.A. 25 (Am. Compl. ¶ 77). Likewise, it also increases the potential civil and criminal liability that Respondents could face if they currently mine peat on the land. *Id.* The cost of obtaining a permit is anticipated to exceed

$100,000.00. J.A. 17 (Am. Compl. ¶ 44). Respondents are thus faced with putting their land to a legitimate purpose at the risk of civil and criminal liability, or engaging in the time-consuming and expensive process of obtaining a Section 404 permit from the Corps before conducting their proposed activities. J.A. 25 (Am. Compl. ¶ 78). Additionally, the Corps informed Respondents of the substantial and expensive area-wide research projects that would be required as a prerequisite to obtain a Section 404 permit. J.A. 17 (Am. Compl. ¶ 44); J.A. 34 (Aug. 25, 2011 Corps letter).

There is a risk of erroneous deprivation of Respondents' property interest with the current delayed APA review procedures. On several occasions, Corps representatives made comments to Respondents, suggesting a preordained adverse adjudicatory result that ultimately came to be. J.A. 15-18 (Am. Compl. ¶¶ 40-50); Pet. App. 6a-7a. The resulting approved jurisdictional determination concluded that the land at issue contains "waters of the United States," regulated by the Corps under Section 404 of the CWA. J.A. 18 (Am. Compl. ¶ 50); 33 U.S.C. § 1362(7); *see also* 33 U.S.C. § 1251 *et seq.* After Respondents secured an administrative remand of the approved jurisdictional determination from the Regulatory Appeals Review Officer, the Corps issued its revised approved jurisdictional determination without curing the deficiencies identified by the Review Officer. J.A. 20-21 (Am. Compl. ¶¶ 54-57); Pet. App. 7a-8a. This case presents a situation of a "constitutionally intolerable choice" because "compliance is sufficiently onerous and coercive penalties are sufficiently potent." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (citing *Ex parte Young*, 209 U.S. 123, 148 (1908)).

It is probable that the additional procedural safeguard of immediate APA review will have a curative effect on wrongly-issued administratively final and exhausted Corps jurisdictional determinations. *See* 33 C.F.R. §§ 331.10 (final decision), 331.12 (exhaustion of administrative remedies). A federal court is the required next step to determine if the Corps revised approved jurisdictional determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," upon review of the administrative record. 5 U.S.C. § 706(2)(A).

The traditional governmental interests of protecting the public fisc and preserving administrative resources do not outweigh the other *Mathews* factors. *See Mathews*, 424 U.S. at 335. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Here, Article III review presents a limited burden on the Corps, obliging it only to compile an administrative record.

Concerns of stifling adjudicatory efficiency with the timing of judicial review are unfounded because there is little societal cost or administrative burden associated with the challenging of a Corps conclusion that land contains "waters of the United States." Br. at 5-6. In 2015, interested parties filed only "eight administrative appeals of approved jurisdictional determinations issued outside of the permitting process." *Id.* The immediate judicial review of such Corps adjudications would serve the public interest in deterring legally infirm Corps adjudications on an issue that carries potent consequences upon a finding of CWA applicability. Accordingly, immediate APA reviewability of the Corps revised approved jurisdictional determination is required.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did Congress grant the Corps of Engineers unreviewable power to require landowners to pursue permits under the Clean Water Act even when there is a dispute as to whether the land in question is covered by the Act?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include that individual liberty is best protected by the design of separated powers. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing separation of powers, including *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015), *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015); and *Christopher v. SmithKlein Beecham Corp.*, 132 S.Ct. 2156 (2012), to name a few.

SUMMARY OF ARGUMENT

The bar on judicial review sought by the Corps of Engineers in this case would concentrate all three powers of government in the agency. In arguing that its "jurisdictional determinations" are not reviewable, the Corps asserts the power to compel property owners to apply for permits they do not want and do not believe that they need. This case is an example of

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[1] Pursuant to this Court's Rule 37.3 all parties have filed blanket consents to amicus participation with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

what the framers feared when they insisted on a separation of powers in government.

ARGUMENT

I. Prohibition of Judicial Review of Jurisdictional Determinations Violates Separation of Powers.

A. Actual separation of powers is critical to the design of government in the Constitution.

The structural limits on the exercise on constitutional powers were not designed because the founders were "anti-government" or as a means of frustrating democratic self-government. The framers of the Constitution understood the need for a national government to control the problems created by individual state governments competing for trade and intent on avoiding financial obligations. *See* Letter of George Washington to John Jay, August 1, 1786, reprinted in 1 THE FOUNDERS' CONSTITUTION, 162 (Philip B, Kurland & Ralph Lerner, eds. 1987); James Madison, Vices of the Political System of the United States, April, 1787, reprinted in 1 THE FOUNDERS' CONSTITUTION, 167. Instead, these limitations on the exercise of power grew out of the recognition that despite the best intentions, those in power tend to accumulate power at the expense of individual liberty. As James Madison noted, the framers sought to design the government "to be administered by men over men" – that is, one that took account of the shortcomings of human nature. Although the electorate was the primary means in the system they designed of "obliging the

government to control itself," they had enough experience to recognize "the necessity of auxiliary precautions." The Federalist No. 51 at 322 (James Madison) (Clinton Rossiter, ed. 1961).

Separation of powers emerged as the primary structural mechanism that would insure that the government would govern itself. The Founders did not invent this concept. They relied heavily on the writings of Montesquieu, Blackstone, and Locke for their theory about how to design government. *E.g.*, John Adams, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, (1797) Letter XXVIII, vol.1 at 154 (Lawbook Exchange, Ltd. 2001) (essay on Montesquieu). Montesquieu explained that, "there is no liberty, if the judiciary power be not separated from the legislative and executive." Montesquieu, THE SPIRIT OF THE LAWS (1748) bk. XI, ch. 6, at 152 (Franz Neumann ed. & Thomas Nugent trans., 1949). He cautioned that if judicial power is joined with legislative power, "the life and liberty of the [governed] would be exposed to arbitrary control." Likewise, if judicial power were joined to the executive power, "the judge might behave with violence and oppression." *Id.* This, he said, "would be an end of everything." *Id.*

There was little argument during the ratification debates challenging the view that separation of powers needed to be an essential component in any new federal government. Even before a national constitution was ever considered, the Founding generation made sure that newly formed state governments were based on separated powers.

The Virginia Declaration of Rights, adopted in June, 1776, insisted that "legislative and executive

powers ... should be separate and distinct from the judiciary. Va. Dec. of Rights, Sec. 5 (1776), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 530 (John P Kaminski, et al. eds. 2009). The new Virginia Constitution adopted that same month also required that the branches of government be "separate and distinct" and commanded that they not "exercise powers properly belonging to the other." Va. Const. of 1776, in 8 DOCUMENTARY HISTORY, *supra* at 533.

The Massachusetts Constitution of 1780 contained a similar provision, and added the purpose of separated powers "to the end it may be a government of laws, and not men." Mass. Const. of 1780, Part I, Art. XXX, in 4 DOCUMENTARY HISTORY, *supra* at 445.

The denial of separated powers was among the complaints against the crown listed in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE, 1 Stats. 1, 2 (1776) (noting obstruction of the administration of justice and making judges "dependent on his will alone"). Justice Story noted that the first resolution adopted by the Constitutional Convention in 1787 was for a plan of government consisting of three separate branches of government. Joseph Story, COMMENTARIES ON THE CONSTITUTION, § 519 (1833) (Little Brown & Co. 1858).

Indeed, there was no debate about whether the separation of powers would be a feature of the new government. Instead, the question was whether the proposed constitution provided sufficient separation.

James Madison explained that a mere prohibition on exercising the powers of another branch of government was not sufficient. Such a prohibition was a

mere "parchment barrier" between the branches. THE FEDERALIST No. 48 at 166 (James Madison). Thus, the Constitution was designed to give the members of each branch the power to resist encroachment on their powers. THE FEDERALIST No. 51, at 182.

The judiciary, in particular, was designed to serve as a check on the political branches, to ensure that they did not venture beyond their constitutional authority and thereby endanger liberty. As Alexander Hamilton noted, a robust judicial power was necessary if the courts were to serve as "bulwarks" for liberty. The Federalist No. 78, *supra*, at 287 (Alexander Hamilton).

The rise of the modern administrative state proves that the framers' fears were warranted. This case demonstrates that the concentration of all three powers of government in one agency endangers individual liberty – here individual rights in private property.

B. The Army Corps of Engineers in this case seeks to exercise executive, legislative, and unreviewable judicial power.

First, the Corps has used **legislative** power to expand its power under the Clean Water Act from regulating activity that directly affects a navigable waterway to its claim today of regulating even non-navigable waters, including small tributaries and dry channels, thereby displacing the states as the primary regulator of land use. This is a claim of extraordinary legislative power not granted by Congress.

The Clean Water Act empowers the Corps of Engineers to regulate dredging and filling of "navigable

waters" defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344, 1362. Initially, the Corps interpreted its jurisdiction as encompassing waters that were useable as a channel of interstate or foreign commerce. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs. (Solid Waste Agency)*, 531 U.S. 159, 168 (2001). Although that interpretation appeared to extend to the limit of Congress' authority under the Commerce Clause, the Corps soon began to extend its own power by redefining "navigable waters" much more broadly. This re-definition took place without any new law from Congress. The agency simply decided that the law now meant something different.

This Court acquiesced in the decision of the Corps to expand the reach of the Clean Water Act to a "wetland" that was immediately adjacent to a navigable water. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). The Corps then decided to stretch the Clean Water Act even further to cover waters that had no connection at all to navigable rivers, lakes, or seas. In *Solid Waste Agency*, the Corps argued that it was sufficient for coverage under the Clean Water Act if migratory water fowl might use the waters. *Solid Waste Agency*, 531 U.S., at 164. This Court ruled that the text of the Clean Water Act would not allow the Corps' attempt to expand its jurisdiction. *Id.*, at 168. Nonetheless, the Corps continues to test the bounds of its jurisdiction to regulate land use.

There are no statutory guidelines that control the Corps' desire to increase its jurisdiction. As noted in *Solid Waste Agency*, the *Riverside Bayview* Court recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would

not be deemed 'navigable' under the classical understanding of that term." *Solid Waste Agency*, 531 U.S., at 171. This Court candidly admitted, however, that the statute gives no guidance "of what those waters might be." *Id.* That is, there is no intelligible principle by which the Court can judge the Corps' claim of authority to regulate "waters" that are not navigable. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *Dep't of Transp.*, 135 S.Ct at 1246 (Thomas. J., concurring in the judgment) (noting that the "intelligible principle doctrine does not "adequately reinforce the Constitution's allocation of legislative power.").

The Court again faced the problem of the Corps' expansive assertion of jurisdiction under the Clean Water Act in *Rapanos*. There, the Corps sought to include within its Clean Water Act jurisdiction any land containing a channel through which rainwater might occasionally flow. *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (Scalia, J., plurality opinion) (Scalia, J., plurality opinion). The plurality rejected a reading of the Clean Water Act that would allow regulation of dry channels through which water occasionally flows. *Id.*, at 733. The Corps has chosen not to follow the guidance in the plurality opinion, however. Instead, the Corps claims to follow Justice Kennedy's separate opinion arguing that the Clean Water Act could extend to some dry channels so long as there was a "significant nexus." *Id.*, at 782 (Kennedy, J., concurring in the judgment).

Although the Corps purports to rely on Justice Kennedy's "significant nexus" formulation, their claim of jurisdiction in such cases deprives that formulation of any meaning. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 984 F Supp. 2d 538 (E.D.

Va. 2013) (asserting jurisdiction over a patch of wetlands that sits adjacent to (but does not directly abut) a 2,500-foot manmade drainage ditch, which flows from February through April into another perennial drainage ditch 900 feet away, which runs into a larger tributary about 3,000 feet away, which eventually flows, after approximately three to four miles, into a traditional navigable water); *see also, Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (where water from a "roadside ditch" took "a winding, thirty-two-mile path to the Chesapeake Bay"); *Cmty. Assn. for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-55 (9th Cir. 2002) (irrigation ditches and drains that intermittently connect to covered waters); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005) (where the Corps was asserting jurisdiction over land where "water courses through the washes and arroyos of the arid development site during periods of heavy rain").

Second, the Corps of Engineers exercises robust **executive power** under the Clean Water Act. The Corps controls whether to issue a permit for "dredge or fill" activity, it controls how long it will take to get a permit, and it controls how expensive the process will be for a property owner. Should a property owner decline to secure the Corps' permission before taking action on property the Corps has deemed to be within its jurisdiction, the Corps decides whether to refer the case for criminal prosecution. 33 C.F.R. § 326.5

In 2002, the average time for processing a permit was more than two-years and the average cost for

property owners exceeded a quarter million dollars. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (Scalia, J., plurality opinion). While the regulations state that the Corps will act on a permit within 60 days (33 C.F.R. § 325.2(d)), the Corps is in complete control of the process because the 60 day period does not start to run until the Corps decides the application is complete (33 C.F.R. § 325.7(d)(10)).

The 2002 "averages" are exceeded by large projects, especially when there is opposition (either within the Corps or by external groups). In one case, a permit was denied six years after the application was filed, and in another, the permit was granted after four years. *Resource Investments, Inc. v. United States*, 151 F.3d 1162, (9th Cir. 1998) (Appellant's brief at n.15); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1152-53 (9th Cir. 2005). The Mingo Logan Coal Company spent millions of dollars on its application and waited nearly 10 years to receive a permit. The Environmental Protection Agency, which also exercises authority under the Clean Water Act, later vetoed the permit. *Mingo Logan Coal Company, Inc. v. U.S. Env. Prot. Agency*, 70 F. Supp. 3d 151, 158-60 (D.D.C. 2014).

The record in this case suggests that the petitioner would be required to spend substantially more than the average, and that it would take several years before a final decision would be rendered. Army Corps personnel have told petitioner that it should not even bother to apply for a permit since the application will require expensive environmental studies that will take a significant time to complete. Even if petitioner invests the time and money into the application, the

Corps personnel have said that the permit will be denied.

Third, the Corps now claims exclusive interpretive, or **judicial**, power to judge whether a parcel of dry land is within the ever-expanding definition of "navigable waters." As noted above, there is no intelligible principle for guiding the Corps' exercise of quasi-legislative power to define the scope of its jurisdiction. In this case, the Corps argues further that it has the power to make an unreviewable quasi-judicial determination as to whether a particular parcel of property is subject to its jurisdiction under the Clean Water Act.

If a property owner cannot obtain immediate judicial review of a jurisdictional determination, the only choice is to pursue a permit from the Corps. This is a permit that the property owner does not want, does not believe it needs, and which the Corps has indicated that it will deny after the owner spends significant sums on environmental studies and puts up with years of delay. The property owner has no choice, however, "because the Clean Water Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'" *Rapanos*, 547 U.S., at 719 (Scalia, J., plurality opinion).

Without judicial review, the Corps can force a property owner to abandon his property. If the owner decides to pursue the permit, the Corps controls the length and cost of the process. Pursuit of a permit that the law may not even require can come to resemble a Sisyphean task of rolling the boulder up the mountain while the Corps decides it needs new environmental studies or more information, forcing the

owner to start the task all over. The property owner loses under either scenario. This combination of executive, legislative, and judicial power allows the Corps to expand its jurisdiction beyond the reach of Congressional intent without ever having to face judicial review. The separation of powers problem is exacerbated because the Corps will never have to face voters. It simply becomes a government unto itself. This is the tyranny of which Montesquieu warned, and which the framers sought to avoid with their careful crafting of separated powers.

CONCLUSION

The Court should hold that jurisdictional determinations are subject to judicial review in order to avoid a violation of separation of powers.

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UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

Many industries in which the Chamber's members operate regularly confront issues concerning the scope of the Clean Water Act and would be adversely affected if they were unable to challenge a jurisdictional determination by the Army Corp of Engineers. These industries include manufacturing, mining, asphalt production, food production, pulp and paper production, paint manufacturing, electricity production, energy development, water utilities, sand, stone, and gravel operations, road construction and maintenance, landfills, real estate development, railroads, industrial development, and agriculture.

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1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Without the timely ability to seek judicial review under the Administrative Procedure Act, the Chamber's members will be blocked from conducting routine activities on their property until they endure an expensive, vague, and time-consuming regulatory process. These burdens will cause substantial harm to the Chamber's members; indeed, in many instances, the cost of compliance or the risk of exorbitant penalties will force them to abandon valuable projects and activities altogether.

SUMMARY OF ARGUMENT

Approved jurisdictional determinations are final agency actions subject to judicial review because they have substantial real-world consequences on the legal rights and obligations of landowners. The Army Corps of Engineers ("Corps") seeks to minimize the impact of its jurisdictional determinations, but without the ability to seek immediate judicial review of an unfavorable jurisdictional determination, a landowner is left with three untenable options. First, the landowner can apply for a permit, submit to the attendant costs and delays, and seek judicial review of the jurisdictional determination when the permit process is complete, often years later. Second, the landowner can proceed without a permit and risk exposure to an enforcement action carrying significant penalties. Or third, the landowner can walk away from the endeavor altogether and thus forfeit the right to challenge the agency determination in court. As the Eighth Circuit correctly recognized, landowners should not be confined to these three options.

Landowners who decide to apply for permits and defer (or forego) any judicial review must be prepared

for long delays and high costs. As a plurality of the Court recognized in *Rapanos v. United States*, 547 U.S. 715 (2006), the average applicant for an individual Corps permit spends 788 days and $217,596 to complete the process. *Id.* at 721. There are myriad examples of businesses suffering such delays and expenses. For example, the Court of Federal Claims recently documented how one business spent seven years and millions of dollars seeking a Section 404 permit—only for a federal court to rule later that the Corps lacked jurisdiction all along. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447 (2009). Allowing prompt judicial review of jurisdictional determinations under the Administrative Procedure Act ("APA") would avoid this type of senseless delay and expense.

Some landowners might decline to seek a permit under the Clean Water Act ("CWA"), as the prospect of a long, expensive, and likely futile permitting process is simply not a viable option. But for many, it is not feasible to move forward with development plans and to risk severe civil and criminal penalties. Thus, the likely outcome if the Corps' position prevails and its jurisdictional determinations are insulated from judicial review is that landowners will simply abandon beneficial activities, resulting in unrealized economic potential and diminished faith in government.

The Corps' position not only misconstrues the timing and scope of judicial review under the APA, but if adopted by this Court, it also would inflict serious harms on American business, including increased permitting costs, depreciation in property values, and substantial delays of business activities. In light of the severe pragmatic consequences, this Court should hold that a jurisdictional

determination is a final agency action subject to immediate judicial review under the APA.

ARGUMENT

I. Jurisdictional Determinations Are Final Agency Actions Subject to Judicial Review.

The APA permits judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Two conditions must be satisfied for agency action to be considered "final": "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Jurisdictional determinations satisfy both prongs of this test for final agency action. *See* Brief of Respondent ("Resp. Br.") at 18-39.

As to the first prong, there is no question that a jurisdictional determination is the "consummation of the agency's decisionmaking process" and is not "merely tentative or interlocutory [in] nature." *Id.* When an agency has "asserted its final position on the factual circumstances underpinning" its action, that is a decisive indication that it has consummated the decisionmaking process. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004). Similarly, once an agency decision has completed the administrative appeal process—and therefore is not subject to further agency review—"the process of administrative decisionmaking has reached a

stage where judicial review will not disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970).

By its terms, a jurisdictional determination is "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction" under the CWA. 33 C.F.R. § 331.2. Once a determination has wound its way through the administrative appeal process, it is final and not subject to further review by the agency. *See id.* § 331.9. That is precisely why Corps regulations provide that "the public can rely on that determination as a Corps final agency action." 51 Fed. Reg. 41,206. In short, through the jurisdictional determination, the Corps asserts its final position on the facts underlying jurisdiction—that is, the presence or absence of "waters of the United States" within the meaning of the CWA.

The jurisdictional determination at issue here demonstrates the finality of the agency action. The determination Respondent received was the product of several rounds of administrative review in response to an application for a Section 404 permit.[2] The Corps issued a "preliminary" determination in March 2011, a "draft" determination in November 2011, and, finally, an "approved" jurisdictional determination in February 2012. Petition Appendix ("Pet. App.") 6a-7a. Following

2. The CWA provides certain exceptions to its prohibition of "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the EPA to "issue a permit for the discharge of any pollutant," and Section 404 authorizes the Corps to "issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* §§ 1342, 1344.

an administrative appeal, the "approved" determination was reissued as a "revised" jurisdictional determination in December 2012. *Id.* at 7a. The "revised" determination provided that it was a "final Corps permit decision in accordance with 33 C.F.R. § 331.10." *Id.* at 7a-8a. In other words, the jurisdictional determination was a "definitive, official determination." U.S. Army Corps of Eng'rs: Regulatory Guidance Letter No. 05-02 (June 14, 2005).

Accordingly, every court of appeals to address this issue has held that these jurisdictional determinations satisfy the first prong of the *Bennett* test. *See Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389-90 (5th Cir. 2014); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008). Indeed, despite repeatedly arguing to the contrary, *see, e.g.*, Pet. App. 9a, even the Corps now concedes that a jurisdictional determination satisfies this requirement, *see* Brief of Petitioner ("Pet. Br.") 25-26.

The jurisdictional determination likewise satisfies the *Bennett* test's second prong. It establishes "rights and obligations" and has "legal consequences." *Bennett*, 520 U.S. at 177-78. The Corps contends that a jurisdictional determination does not expand or contract the landowner's rights or options; according to the Corps, the determination merely "provides additional information that the landowner may find useful in choosing between those alternative courses of conduct." Pet. Br. 16.

But this is simply not true. As the Eighth Circuit understood, significant obligations and consequences follow from a jurisdictional determination. In particular, a determination requires landowners "either to incur

substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." Pet. App. 11a. Seeking a permit is expensive, time-consuming, and often futile (as it was here). *See infra* 15-24. Ignoring the determination and proceeding with the activity risks the imposition of massive civil and criminal penalties through a government enforcement action. *See infra* 24-25. And walking away from the project nullifies potentially beneficial opportunities for that property and deprives the landowner of his day in court. *See infra* 26-28. Limiting landowners to such untenable options, in other words, has "direct and appreciable legal consequences" and thus satisfies the second *Bennett* factor. Pet. App. 14a.

Moreover, the Corps' understatement betrays a fundamental failure to appreciate the practical realities facing landowners who must grapple with the real-world implications of complex and burdensome federal environmental regulation. It often is extremely "difficult and confusing ... for a landowner to predict whether or not his or her land falls within CWA jurisdiction." Pet. App. 20a. Individuals and businesses seeking to undertake construction projects where wetlands are in the general vicinity must examine numerous factors to make this determination. This exercise often requires the involvement of lawyers, expert consultants and certified wetland delineators.

To say that a landowner with an unfavorable jurisdictional determination is free to treat it as carrying no more weight than a "private consultant's report," Pet. Br. 32, is simply not true. This Court's precedent does not require such a constrained reading of agency action.

See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967) (finding that drug labeling regulations constituted a final agency action because they put drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing "misbranded" drugs); *Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956) (finding an Interstate Commerce Commission order reviewable because "the determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact," as it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties").

Importantly, the Corps' unreasonably narrow conception of the second *Bennett* factor might harm more than just landowners. It could prevent environmental groups or neighboring property owners, for example, from challenging negative jurisdictional determinations (*i.e.*, that there are no "waters of the United States" on property). *Compare* Pet. Br. 40 ("Just as an affirmative jurisdictional determination does not impose any independent legal barrier to pollutant discharges, a negative jurisdictional determination does not have the legal effect of a permit issued by the Corps pursuant to 33 U.S.C. 1344."), *with Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 459 (D.S.C. 2011) (finding that "legal consequences do flow from the Corps' 2010 JD ('negative' determination), as any developer of the property could conceivably immediately begin to fill and dredge the eighty-plus acres that the Corps determined to be non-jurisdictional"). *See also Fairbanks N. Star Borough*, 543

F.3d at 597; *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 316 (4th Cir. 1988).

In the end, the second *Bennett* factor must account for the attributes of the regulatory regime to which it is being applied. Whatever may be true in other settings, there can be no doubt that a jurisdictional determination by the Corps creates the kind of rights and obligations that are sufficient to warrant immediate judicial review. Forcing landowners to choose from a menu consisting of administrative purgatory, surrender of rights, or civil disobedience is inappropriate and unwarranted. A jurisdictional determination therefore is final agency action under the APA.

II. The Corps' Reading of "Final Agency Action" Would Insulate Its Decisions from Judicial Review.

The Corps forecasts dire consequences if its jurisdictional determinations are subject to immediate judicial review, including the possibility that the agency may cease making such determinations altogether. *See* Pet. Br. 24. But the Corps has it backwards. It is the individuals, businesses, landowners, and anyone else seeking legal certainty about the status of their property who will suffer if jurisdictional determinations are unreviewable.

Landowners interested in pursuing development projects are limited to four options: (1) decline to seek a jurisdictional determination in the hope that their land does not contain "waters of the United States"; (2) request a jurisdictional determination and, if unfavorable, apply for a permit under Section 404 and challenge the

determination in court if the permit is denied; (3) proceed with the plans and decline to seek a permit under Section 404 in the hope that the lands do not contain "waters of the United States," thus risking civil and criminal penalties, which could be challenged later; or (4) abandon the plans entirely. None of these options is tenable.

A. Landowners Might Decline to Request Jurisdictional Determinations if the Agency's Decisions Are Not Subject to Judicial Review.

Jurisdictional determinations are necessary because under the Corps' current approach to the CWA, landowners often have no idea whether their lands are subject to the law's requirements. *See* Pet. Br. 5, 23-24. The CWA prohibits "the discharge of any pollutant" into "navigable waters" without a federal permit. 33 U.S.C. §§ 1311(a), 1362(12); *id.* § 1362(7) (defining "navigable waters" to mean "the waters of the United States, including the territorial seas").

For most of American history, the meaning of "navigable waters" has been reasonably straightforward. Before the CWA, the Supreme Court had long interpreted the phrase "navigable waters of the United States" to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *See The Daniel Ball*, 10 Wall. 557, 563 (1870); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940).

The Corps retained this understanding when, shortly after passage of the CWA in 1972, it promulgated rules adopting the traditional judicial definition of "navigable waters." *See* 33 C.F.R. § 209.120(d)(1) (1974) (defining

"navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce"). In doing so, the Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." *Id.* § 209.260(e)(1). As a result, in the years immediately following the passage of the CWA, it was rarely disputed whether land contained "navigable waters."

But this certainty soon eroded. In 1975, the Corps adopted new regulations that extended the definition of "waters of the United States" to the outer limits of Congress's commerce power. Specifically, the Corps expanded "waters of the United States" to include navigable waters and their tributaries, as well as *non*-navigable intrastate waters that could affect intrastate commerce. 40 Fed. Reg. 31,324-25 (July 25, 1975); *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding the Corps' classification of a Michigan wetland "characterized by saturated soil conditions and wetland vegetation [that] extended beyond the boundary of [the] property to ... a navigable waterway" because the property was "part of a wetland that actually abuts on a navigable waterway"). In 1986, the Corps expanded the definition of "waters of the United States" even further, asserting jurisdiction over traditional navigable waters, tributaries of those waters, wetlands adjacent to those waters and tributaries, and waters used as habitats by migratory birds that either are protected by treaties or cross state lines. 51 Fed. Reg. 41,206 (Nov. 13, 1986).

This Court twice rejected the Corps' assertion of power as too broad. In *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, the Court concluded that the CWA did not give the Corps jurisdiction to regulate an abandoned sand and gravel pit that provided a habitat for migratory birds. 531 U.S. 159 (2001). And in *Rapanos v. United States*, the Court found that the CWA did not give the Corps jurisdiction over four Michigan wetlands that were "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." 547 U.S. 715, 729 (2006).

In the wake of *Rapanos*, the Environmental Protection Agency ("EPA") and the Corps issued new informal guidance as to how it would analyze "waters of the United States." *See* U.S. Envt'l Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008). The 2008 guidance, among other things, explained the approach the Corps would use to determine whether waters were subject to the CWA. The Corps recognized that further consideration of jurisdictional issues could be appropriate in the future, either through issuance of additional guidance or through rulemaking.

In June 2015, the EPA and the Corps released a final rule expanding the reach of "waters of the United States" under the CWA. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053-37,127 (June 29, 2015) ("WOTUS Rule"). This rule broadens the definition of "waters of the United States" by, among other things, (1) adding a new category of waters "adjacent" to primary waters, including "neighboring" waters within

certain distances, 40 C.F.R. § 230.3(o)(1)(vi); (2) adding a new category of waters located within certain distances of primary waters, if the new category of waters has a "significant nexus" to a primary water, *id.* § 230.3(o)(1)(viii); and (3) redefining "tributaries" in a way that vastly expands federal jurisdiction over streams that are dry for most of the year, *id.* § 230.3(o)(3)(iii). In October 2015, the Sixth Circuit stayed this rule, *see In re: EPA*, 803 F.3d 804 (6th Cir. 2015), which is the subject of numerous federal lawsuits throughout the country.

Whether the Corps' 2008 guidelines control—as was the case for Respondent—or the new rules survive judicial challenge, there is no doubt that many landowners will remain uncertain about their obligations under the CWA. No longer may a landowner simply examine whether a water is "capab[le] of use by the public for purposes of transportation or commerce." 33 C.F.R. § 209.260(e)(1) (1974). Instead, jurisdictional determinations will require complex, fact-bound analysis and will often have no easy answer.

Jurisdictional determinations thus provide individuals and businesses with clarity regarding their regulatory obligations. *See* Pet. Br. 23-24. But if they are insulated from timely judicial review, then some landowners may fairly reconsider whether seeking them is worth the time and effort. After all, securing a jurisdictional determination is not easy. They "require documentation that identifies if there is the presence and/or absence of jurisdiction," such as "[m]aps, aerial photography, soil surveys, watershed studies, scientific literature, previous [jurisdictional determinations] for the review area, and local development plans." *U.S. Army Corps*

of Engineers Jurisdictional Determination Form Instructional Guidebook 47 (2007). And "jurisdictional determinations for more complex sites may require additional documentation," such as "documentation that evaluates if there is a significant nexus between the tributary/wetland system in question and the [traditional navigable waters]." *Id.*

Faced with such a process—and with dim prospects for meaningful judicial review if the outcome is unfavorable—some landowners might conclude that it is better to roll the dice, hope that the land at issue has no "waters of the United States," and then seek a permit or abandon the activity if the Corps later disagrees. Indeed, a review of the Corps' permitting process "suggest[s] that there is much truth in the old saying that it is better to ask for forgiveness (after the fact) than to seek permission (before the discharge)." Royal C. Gardner, *Lawyers, Swamps, and Money: U.S. Wetland Law, Policy, and Politics* 165 (2011).

But this path also has significant risks. Moving forward without certainty may invite a cease-and-desist order from the Corps. As a former wetland attorney for the Department of the Army has explained, the recipient of a Corps cease-and-desist order faces a difficult choice:

> [You can] stop your activities and apply for the [Section 404] permit, or continue with your activities and take your chances that you will prevail when the Corps or the EPA takes you to court. Neither option is attractive. Suspending development operations can be very expensive, especially if equipment and workers are idled for months, and banks and investors are

> looking to be repaid. But defending against an enforcement action will also be quite costly even if you prevail. Your attorney fees cannot be shifted to the government. And if you lose, you are facing thousands of dollars in penalties and restoration costs.

Id. at 164.

Of course, the better option for all concerned is to obtain certainty before undertaking these actions. It allows landowners and the Corps to work, often collaboratively, to evaluate the land in question and to formalize that process through a jurisdictional determination. But landowners might have less incentive to engage in that process without the availability of immediate judicial review in those situations where they disagree with the Corps' determination.

B. Enduring the Long, Expensive, and Often Futile Permitting Process Is Not a Viable Option.

If a landowner receives an unfavorable jurisdictional determination, the only option for challenging it without risking civil and criminal penalties is to suspend any activities and to seek a permit from the Corps. But the permitting process is long and costly, which may render it an unrealistic alternative in many situations. Nearly a decade ago, the average applicant for an individual Corps permit "spen[t] 788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721; *see also* Pet. App. 14a ("[T]he permitting option is prohibitively expensive and futile."). Moreover, this does not even account for the costs

of mitigation or design changes. The plurality in *Rapanos* noted that over $1.7 billion was spent annually to obtain wetlands permits. *See* 547 U.S. at 721 (quoting Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-76, 81 (2002)). The expense and processing time have not improved since the Court's decision in *Rapanos* almost a decade ago. *See* D. Sunding, *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States* at 15-17 (May 15, 2014), http://goo.gl/PKBaWP. Indeed, Respondent here would need to spend more than $100,000 to complete the nine hydrological studies requested by the Corps and endure several years of delays to complete an Environmental Impact Statement. Resp. Br. 10-11; *see also* Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. Ark. Little Rock L. Rev. 413, 444 n.142 (2008).

The Corps downplays the Court's finding in *Rapanos* and attempts to paint a rosy picture of the Section 404 permitting process. *See* Pet. Br. 46-50. But anyone who has had to endure this process knows full well the agony that comes with obtaining this approval. The permitting process contains numerous steps with countless opportunities for delay and increased expense. To appreciate more fully just how onerous it is to obtain a Section 404 permit, it is helpful to consider the seven steps it generally involves:

(1) Pre-Application Consultation. First, landowners ordinarily must have a pre-application meeting with Corps staff. The pre-application meeting is designed to

assist potential applicants in determining the extent of the Corps' jurisdiction and the applicant's obligations under the CWA. 33 C.F.R. § 325.1(b). The applicant must be prepared to discuss potential modifications to the project that would avoid any loss of aquatic resources. *Id.* §§ 320.4(r), 332.1; *see generally* Stephen M. Johnson, *Individual Permits* 192 (2005), in Kim D. Connolly, et al., *Wetlands Law and Policy: Understanding Section 404* (2005).

(2) Submission of Application. After the pre-application meeting, the landowner must prepare his permit application. An application must contain, among other things: (1) a complete description of the proposed activity, including necessary drawings, sketches, or plans sufficient for public notice; (2) the location, purpose, and need for the proposed activity; (3) a scheduling of the proposed activity; (4) the location and dimensions of adjacent structures; and (5) a list of authorization required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made. 33 C.F.R. § 325.1(d)(1). Furthermore, because a Section 404 permit involves dredged or fill material, the application also must include: (1) the purpose of any discharge; (2) a description of the type, composition, and quantity of the material; (3) the method of transportation and disposal of the material; and (4) the location of the disposal site. *Id.* § 325.1(d)(4). Myriad additional information may be necessary depending on the proposed activity. *Id.* § 325.1.

(3) Completeness Review. Within 15 days of receiving the application, the Corps must determine that the application is complete or notify the applicant of any missing information. *See* 33 C.F.R. § 325.2(a)(2). The application process will not move forward until the

application is deemed "complete."

(4) Public Notice. Within 15 days of receiving a "complete" application, the Corps must issue a public notice and schedule a public comment period. 33 C.F.R. § 325.2(d). The comments and responses the Corps receives will be made part of the application's administrative record for consideration during the evaluation process. *Id.* § 325.2(a).

(5) Review of Comments and Public Hearing. After the Corps receives the comments on the permit application, the agency must inform the applicant about substantive comments it received and give the applicant an opportunity to provide additional information. *Id.* The Corps may also require the applicant to submit additional information to address specific issues raised in the public comments. The applicant must respond to the Corps' request for information within 30 days. *Id.* When the Corps reviews the comments, it will also determine whether it is necessary to hold a public hearing on the permit application. *Id.*

(6) Application Evaluation. In evaluating Section 404 permits, the Corps must comply with the Section 404(b)(1) Guidelines, which are promulgated by the EPA pursuant to 33 U.S.C. § 1344(b)(1), and incorporated by the Corps into its own regulations. *See* 40 C.F.R. pt. 230; 33 C.F.R. § 320.2(f). The Section 404(b)(1) Guidelines provide that the Corps may not permit discharges that "will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). Under the guidelines, a discharge contributes to significant degradation if it has "[s]ignificantly adverse effects" on human health

or welfare, life stages of aquatic life and other wildlife dependent on aquatic ecosystems, aquatic ecosystem diversity, productivity, and stability, or recreational, aesthetic, and economic values. *Id.*

In addition to reviewing permits under the 404(b)(1) Guidelines, the Corps will decide whether to grant or deny a permit based on a "public interest" review of the benefits and detriments of the proposed activity. Through the public interest review, the Corps evaluates the probable impacts on the public interest of the proposed activity and its use. The factors that the Corps weighs and balances as part of this public interest review include "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, consideration of property ownership, and, in general, the needs and welfare of the people." *Id.* § 320.4(a). The Corps will not grant the permit if doing so would be contrary to the public interest. *Id.*

Although the Corps issues permits under Section 404 of the CWA, other federal laws require the Corps to consult with federal, state, and local agencies, and to undertake other studies during the permit review. These laws include, among others, the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act. *Id.* The Corp must also coordinate its activities with federal, state, and local agencies. *Id.*; *see generally* Johnson, *supra*, at 197-202.

The Corps' regulations nominally require the agency to make a decision on a permit within 60 days after the agency receives a complete permit application. 33 C.F.R. § 325.2(a). But the Corps can (and usually does) extend that deadline. Johnson, *supra*, at 202. Indeed, the regulations do not require the Corps automatically to grant a permit if it does not make a decision within the 60-day period. As a result, the process often takes substantially longer. *See Rapanos*, 547 U.S. at 721.

(7) Appeal Process. If the Corps denies the permit application, the applicant must exhaust all applicable administrative remedies before filing legal action in federal court. 33 C.F.R. § 331.12. Applicants must appeal within 60 days. *Id.* § 331.6. Only after the administrative appeal process is complete may the applicant seek judicial review. *See id.* § 331.12.

In other words, the Section 404 permitting process is a long, arduous, multifaceted inquiry. The fact that the Corps seeks to require landowners to undertake all these steps—before they even can challenge the Corps statutory authority in the first place—shows just how much leverage the agency will hold over landowners who challenge its authority if jurisdictional determinations are not immediately reviewable.

And although the process is long and complicated on paper, the Section 404 permitting process is even more cumbersome in practice. Examples abound of individuals and businesses enduring the long, expensive permitting process. Indeed, the Court of Federal Claims recently documented the travails of one company, Resource Investments, Inc. ("RII"), that was forced to spend

millions of dollars and endure years of delay in the permit process, despite the fact that the Corps had no jurisdiction over the land. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447 (Fed. Cl. 2009).

RII's regulatory odyssey was long and tortuous. In the late-1980s, RII purchased land in order to operate a landfill in Pierce County, Washington. In September 1989, the Corps asserted jurisdiction over the land and told RII that it would need to obtain a Section 404 permit to construct the landfill. After concluding "that it would be unwise to proceed without a 404 permit," RII began the process of preparing its permit application. That application was not filed until August 1990. *Id.* at 460. Despite regulations requiring the Corps to issue a public notice within 15 days of the completed application, it did not issue the notice until March 1992—eighteen months after the application was filed. The public notice was issued only because RII "constantly badger[ed] and prodd[ed] the Corps to [do so]." *Id.* (citation omitted).

The permit process moved no faster following the public notice. "Over the next 14 months, the parties went back and forth over the necessity of revising the project purpose," a regulatory requirement that impacts the scope of the Corps' practicable alternative analysis under the Section 404(b)(1) Guidelines. *Id.* at 461. Finally, in February 1994, RII "acceded to the Corps' demand and changed [its] project purpose, recognizing that [it] ha[d] reached a stalemate and not wanting to delay the 404 process any further." *Id.*

A month later, "to [RII's] dismay, the Corps determined that it would require a federal [Environmental

Impact Statement ('EIS')]." *Id.* Because "the federal EIS took longer to draft than the initial schedule allotted," it did not issue until December 1995. *Id.* During the drafting of the federal EIS, RII "altered [its] landfill project plan, specifically attempting to address the Corps' stated concerns." *Id.* In particular, the revised plan "reduced impacted wetlands from 37 acres to 21.6 acres, abandoned plans to relocate the South Creek, a small stream on the project site, and modified the original wetlands mitigation plan." *Id.* Despite these changes, the Corps never accepted RII's federal EIS. *Id.*

Finally, in September 1996, the Corps denied RII's permit application—a full *seven years* after the Corps first asserted jurisdiction. The following month, RII filed a challenge to the Corps' decision in federal district court. Eleven months later, in September 1997, the district court upheld the Corps' denial.

In July 1998, almost *nine years* after the Corps first asserted jurisdiction, the Ninth Circuit reversed and held that the Corps had "unreasonabl[y]" asserted jurisdiction over the project site. *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1169 (9th Cir. 1998). Specifically, the court concluded that because the project in question was a solid waste landfill, rather than a fill or dredged material project, the Corps "lacked authority under section 404 of the CWA to require RII to obtain a permit from the Corps before constructing the solid waste landfill." *Id.* at 1168. Accordingly, the court reversed the district court and vacated the Corps' order. Three months later, in October 1998, RII finally began construction on the landfill—"approximately a decade after [they] began

the federal ... permitting process." *Res. Invs., Inc.*, 85 Fed. Cl. at 462.[3]

The Corps' incorrect jurisdictional determination over RII's property is an example of the enormous costs that the Section 404 process can impose on landowners—and the clear need for judicial review. The Corps' permitting process was both long (about seven years) and incredibly expensive (costing "several millions of dollars"). *Id.*; *see also Res. Invs., Inc. v. U.S. Army Corps*, No. 96-5920, ¶ 319 (W.D. Wash. Oct. 31, 1996). The result was that RII's multi-million dollar investment in the project remained stranded, causing the company to lose "millions of dollars of revenue each year" that it could not obtain a permit from the Corps. *Res. Invs., Inc.*, 85 Fed. Cl. at 510. This is exactly the type of delay and expense that immediate review of a judicial determination would avoid.

Put simply, it is an understatement to say that the Section 404 permitting process is long and costly. It is impossible to know the full extent of the aggregate time, energy, and capital that landowners have dissipated in the administrative quagmire that is the Corps' CWA permitting process.[4] But even just a general description

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3. Following the conclusion of the permitting process, RII sued the United States, claiming that the Corps' conduct in the permitting process constituted a regulatory taking. *See Res. Invs., Inc.*, 85 Fed. Cl. 447. After finding genuine issues of material fact, *see id.*, the Court of Federal Claims subsequently dismissed the case for lack of jurisdiction, *see Res. Invs., Inc. v. United States*, 114 Fed. Cl. 639, 644 (Fed. Cl. 2014). A petition for writ of certiorari is currently pending before this Court. *See Res. Invs., Inc. v. United States*, No. 15-802 (S. Ct.).

4. For reference, implementation of the WOTUS Rule alone was estimated by the agencies themselves to increase permitting costs

of the process itself and the example of RII's experience demonstrate that this path is an untenable option for many landowners.

C. Going Forward with a Project and Inviting Severe Civil and Criminal Penalties Is Not a Viable Option.

It also is not a tenable option for individuals or businesses to ignore a jurisdictional determination, to proceed with their planned activities, and then to await prosecution. Indeed, the Corps essentially concedes as much. *See* Pet. Br. 50-51. The CWA imposes severe criminal and civil liability for those who discharge materials without obtaining the required permits. *See, e.g.*, 33 U.S.C. § 1319(c)(1) (providing that any person who negligently violates the CWA may be imprisoned for up to one year); 74 Fed. Reg. 626, 627 (Jan. 7, 2009) (authorizing fines up to $37,500 per violation per day). Only the most fearless would press forward and simply "wait for the agency to drop the hammer." *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012).

The Corps argues that a landowner choosing this path would not receive disfavor from the agency or a federal court. *See* Pet. Br. 30-31. But this is simply unrealistic. Federal caselaw is replete with instances in which courts have castigated individuals for ignoring agency jurisdictional determinations. *See, e.g., United States*

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for affected businesses by $19.8 million to $52.0 million annually. *See* Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 13 (Mar. 2014).

v. Moses, 496 F.3d 984, 989, 991 (9th Cir. 2007) (noting that the defendant "should have listened" to the Corps "before he undertook to ignore the government's steady trickle of warnings," and disputing the defendant's "right to continue [his activities] after jurisdiction was duly asserted").

It simply is impracticable for individuals to invite government prosecution as a means of challenging jurisdictional determinations. Only those who are "courag[eous] or foolhard[y]," *id.* at 992, will ignore the Corps' assertion of jurisdiction and go forward with their business plans. Very few are willing to risk jail time and heavy fines in the face of federal demands. And even those who do go forward will have jurisdictional determinations held against them. Contrary to the Corps' representations, juries and courts will not view the receipt of a jurisdictional determination as just "additional information" that an individual was free to disregard. Pet. Br. 16. A landowner ignores a jurisdictional determination at his peril: he will be seen as showing "contempt" and "disdain" for federal law, *Moses*, 496 F.3d at 986, 992, and the punishments he receives will be fair because he "should have listened," *id.*, to the Corps before taking matters into his own hands.

Thus, although landowners might theoretically have the option to proceed with their plans in potential violation of the CWA, the material risk of exorbitant fines and even imprisonment makes this purported option illusory. If a jurisdictional determination leaves a landowner with the prospect of engaging in willful civil disobedience and accepting the attendant exposure to civil and criminal penalties, then it clearly is an agency action "from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citation omitted).

D. Abandoning Beneficial Activities and Foregoing Judicial Review Are Not Viable Options.

An individual facing an unfavorable jurisdictional determination has a final option: give up and accept defeat. Those who lack the time and money to navigate the permitting process or to endure a government enforcement action may well forego their activities entirely and leave the land fallow.

But such a decision would endanger myriad worthwhile activities that currently require a Section 404 permit. If "waters of the United States" are present, countless activities are swept within the Corps purview, including, among others (1) depositing fill, dredged, or excavated material; (2) grading or mechanized land clearing; (3) ditch excavation activities; (4) fill for residential, commercial, or recreational developments; (5) road fills and placement of rocks and other materials to prevent erosion; (6) the building of any infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; (7) site-development fills for recreational, industrial, commercial, residential or other uses; (8) causeways or road fills; (9) dams or dikes; (10) cultivation for idle areas; (11) forest roads to aid in timber harvest; (12) rock crushing activities that result in loss of natural drainage characteristics; (13) soil removal; and (14) certain vegetation-disturbing operations. *See, e.g.*, 33 C.F.R. § 323.2(f). The list goes on.

Following a jurisdictional determination, the "option" of surrendering potential productive uses of one's land is probably the most palatable alternative for risk-averse landowners. It also may have the greatest negative impact on the economy when considering the aggregate

consequences of the unrealized benefits of developing productive uses of land.

Indeed, one of the greatest challenges facing America in the 21st Century is the rebuilding of the nation's transportation infrastructure. "[S]imply put, transit gets people to their jobs, helps grow the economy in multiple ways, and gives people the opportunity to get to health care, school, recreation, and shopping." Testimony of Janet Kovinoky, U.S. Chamber of Commerce, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs at 2 (Apr. 23, 2015), https://www.uschamber.com/sites/default/files/150422_kavinoky_testimony_to_senate_banking.pdf. But it is well documented that "the performance of the U.S. transportation system is not keeping pace with the demands on that system," as passenger travel and freight traffic have steadily grown but infrastructure investments have not. *Transportation Performance Index: Key Findings*, U.S. Chamber of Commerce (2010), https://www.uschamber.com/sites/default/files/legacy/lra/files/LRA_Transp_Index_Key_Findings.pdf. Indeed, the U.S. Department of Transportation estimates that $18 billion a year will be needed to bring public transit systems to a state of "good repair" by 2028. *See* U.S. Department of Transportation, 2010 Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance (2010).

Despite this urgent need for transportation investments, infrastructure projects are frequently mired in red tape, as they "often require multiple permits and reviews from federal agencies and bureaus responsible for ensuring projects are built safely." White House Press Release, Fact Sheet—Building a 21st Century Infrastructure: Modernizing Infrastructure Permitting

(May 14, 2014); *see also* Kovinoky, *supra*, at 9 (highlighting the need for "transportation policies that cut through red tape at all levels of government so that projects move forward quickly"). These restrictions hamper the country's ability to build a national transportation network that both "supports jobs in the near term ... [and] boosts economic growth and U.S. competitiveness over the long term." *Transportation Performance Index*, *supra*, at 7. This Court should not impose yet another roadblock in the completion of projects vital to this country.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 2, 2016

No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae state and local government associations respectfully submit this amici curiae brief in support of respondents. Amici have a strong interest in federal agency action. That is particularly true when, as here, the agency actions concern environmental policy and economic development. They regularly submit amicus briefs to the Court in cases, like this one, that potentially have significant consequences for the Nation's state and local governments.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working

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[1] The parties have consented to the filing of this *amicus curiae* brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the Amici made a monetary contribution to its preparation (Rule 37.6).

in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that jurisdictional determinations issued by the United States Army Corps of Engineers (Army Corps) are final agency actions subject to judicial review under this Court's test announced in *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997). The Army Corps' jurisdictional determinations are made pursuant to regulations promulgated under the Clean Water Act (the "CWA"). *See* Pub. L. No. 92-500, § 2, 86 Stat.

816 (33 U.S.C. 1251 *et seq.*); 33 C.F.R. 320-334. The Act provides important protections for the Nation's environment, and also recognizes and preserves the primary role of state and local governments in environmental protection and economic development. Thus, Amici, who frequently must promote both stewardship of the lands and economic development, are often impacted by these jurisdictional determinations.

Early judicial review of jurisdictional determinations by the Army Corps is important for the reasons stated by the Eighth Circuit and by respondents. *See* Pet. App. 11a-16a; Resp. Br. 39-50. Jurisdictional determinations under the Act have a real world significant impact on the "rights and obligations" of property owners and local regulators. Amici are uniquely positioned to explain the real world impact of regulatory action by the Army Corps and why prompt judicial review is necessary.

As landowners, Amici face the same timing and cost burdens suffered by respondents if a jurisdictional determination is not subject to prompt judicial review. As governmental entities, Amici also have to consider the cost of obtaining a permit that may not be necessary, in light of other demands on their budgets to provide necessary governmental services. As governmental entities, directed and empowered to provide long-term planning for communities, including economic development and capital infrastructure projects, Amici also need the certainty provided by prompt judicial review of jurisdictional determinations.

ARGUMENT

I. THE ARMY CORPS' JURISDICTIONAL DETERMINATIONS ARE FINAL AGENCY ACTIONS UNDER THE CLEAN WATER ACT THAT HAVE A SIGNIFICANT IMPACT ON STATE AND LOCAL GOVERNMENTS.

The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, provides for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. This Court has recognized that it was Congress's intent "that judicial review should be widely available to challenge the actions of federal administrative officials," *Califano* v. *Sanders*, 430 U.S. 99, 104 (1977), and that the APA "creates a presumption favoring judicial review of administrative action." *Sackett* v. *Envtl. Prot. Agency*, 132 S. Ct. 1367, 1373 (2012). Here, the Army Corps' jurisdictional determination meets the two-part test established by this Court in *Bennett* v. *Spear*: "[f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted).

The Eighth Circuit correctly held that the jurisdictional determination by the Army Corps was a final agency action that is subject to judicial review. Pet. App. 16a-17a. Applying the test this Court set forth in *Bennett*, the Eighth Circuit found that a jurisdictional determination is the consummation of the agency's decisionmaking process and is an action

from which rights or obligations have been determined, or from which legal consequences will flow. Pet. App. 9a-13a. The Eighth Circuit also correctly concluded that there is "'no other adequate [judicial remedy]'" by which a person or entity could contest such a determination. Pet. App. 13a-16a (quoting 5 U.S.C. 704).

Petitioner does not dispute that the decision is "'the consummation of the agency's decisionmaking process.'" Pet. Br. 25 (quoting *Bennett,* 520 U.S. at 177-78). Thus, there are two issues presently before the Court. First, the court must determine whether the jurisdictional determination is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quoting *Bennett,* 520 U.S. at 178). Second, the Court must determine whether, absent judicial review, individuals or entities such as the respondents have another "adequate [judicial] remedy" by which they can contest a jurisdictional determination. *Id.* at 45 (quoting 5 U.S.C. 704).

The Army Corps' jurisdictional determination in this case was made pursuant to the Act's implementing regulations. *See* 33 C.F.R. 320.1(a)(6), 325.9, 331.2. The Act was enacted in its modern form in 1972 with the goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In order to obtain this goal, the Act includes broad limitations on the "discharges" of any "pollutant" into navigable waters without a permit. *See* 33 U.S.C. 1311(a), 1342, 1344. The Act definition of "navigable waters" is "the waters of the United States," 33 U.S.C. 1362(7), a broad definition that has led to much uncertainty as to the reach of federal

jurisdiction. *Rapanos* v. *United States*, 547 U.S. 715, 723-27 (2006); *see also Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054, 37,060-61 (Jun. 29, 2015). Discharges of pollutants include depositing fill, such as soil or other materials, into jurisdictional wetlands, including for purposes of filling those wetlands for development. *Rapanos*, 547 U.S. at 760-61 (Kennedy, J., concurring). This Court has noted that the average applicant for an individual permit "spends 788 days and $271,596 in completing the process." *Id.* at 721.

Amici strongly support the Act's goals of preserving and protecting our nation's wetland resources. Amici also strongly endorse the Act's equally important policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b).

Under the Act, the Army Corps is charged with administering permits for dredged or fill materials. *See* 33 U.S.C. 1344(d). The Army Corps has enacted regulations for its administration of these permits. *See* 33 C.F.R. 320–334. Under these regulations, the Army Corps adopted a rule that allows district engineers to issue "jurisdictional determinations" as to whether federal jurisdiction applies to a particular water or wetland. *See* 33 C.F.R. 320.1(a)(6), 325.9, 331.2. The agency's regulations further provide that a jurisdictional determination "shall constitute a Corps final agency action." 33 C.F.R. 320.1(a)(6). The APA provides for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. The Act's emphasis

on state involvement in environmental protection and development, combined with the uncertainty created by the reach of federal jurisdiction in this area, is of considerable significance to Amici. The Army Corps' determination that a property contains jurisdictional wetlands significantly impacts the Amici as landowners, as regulators under the Act, and as partners with private entities, significantly affecting their ability to fulfill their responsibilities to their citizens.

Depending upon whether a property is determined to contain jurisdictional waters under the Act, development may not be possible at all, or might be allowed only in a specific area and only with a permit, and even then, a permit often contains a requirement for significant investment in mitigation measures. *See, e.g.*, 33 C.F.R. 320.4; Resp. Br. 39-43. As noted above, the Act's permit process also takes significant time, and can cost hundreds of thousands of dollars.

The importance of these determinations is also reflected in the recent "Waters of the United States" rule promulgated by the United States Environmental Protection Agency to clarify the definition of "wetlands." *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (Jun. 29, 2015). Although the legality of this rule is not yet before this Court, the breadth of the rule, and the significant consequences that attend to a determination that a property contains a "wetland," highlight the importance of ensuring, early in the process, that a jurisdictional determination is correct.[2]

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[2] The Sixth Circuit Court of Appeals has issued a stay of the rule

II. JURISDICTIONAL DETERMINATIONS SIGNIFICANTLY IMPACT AMICI'S RIGHTS AND OBLIGATIONS.

The Eighth Circuit correctly noted the significant impact an Army Corps' jurisdictional determination could have on respondents. Pet. App. 13a-17a. Indeed, jurisdictional determinations have substantial, practical effects, which lend credence to the Eighth Circuit's holding that these decisions establish legal rights and obligations and produce significant legal consequences. Pet. App. 11a-13a (quoting *Bennett*, 520 U.S. at 177-78). The practical impact of a jurisdictional determination likewise supports the Eighth Circuit's finding that, absent judicial review, parties such as respondents lack any other adequate judicial remedy by which they can contest such a determination. *Id.* at 13a-16a. The experience of Amici supports the Eighth Circuit's reasoning on both of these points.

As landowners and as governmental planning bodies, Amici need the certainty of prompt judicial review of a jurisdictional determination issued by the Army Corps in order to discharge their myriad obligations to manage limited public funds, protect wetlands, and plan for economic growth and development. As representatives of state and local governments, Amici serve a vital role in providing numerous community services to their citizens. These services may include planning, constructing, and maintaining state and local highways and roads,

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pending its review, which is effective nationwide. *In re U.S. Envtl. Prot. Agency and U.S. Dep't of Def. Final Rule; "Clean Water Rule: Definitions of Waters of the United States," 80 Fed. Reg. 37,054 (Jun. 29, 2015)*, 803 F.3d 804 (6th Cir. 2015).

providing police and fire protection, establishing and maintaining parks and recreational areas for the enjoyment of their constituents, and planning and providing infrastructure for a variety of land use developments, that include industrial and commercial parks, as well as low-income housing. *See* Office of Mgmt. & Budget, *Aid to State and Local Governments* 265 (2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_15_state_and_local.pdf [hereinafter "OMB 2015 Report"].

A. Amici's Role As Landowners Is Impacted.

As landowners of substantial amounts of real property, prompt judicial review of an Army Corps' jurisdictional determination for Amici is of vital importance. Otherwise, a local government may be forced to spend limited public funds to obtain an unnecessary permit, or may choose to abandon an otherwise worthy project.

These types of choices are precisely what confronted Fairbanks North Star Borough in Alaska (the "Borough"), which is a member of the *Amicus* NACo, after the Ninth Circuit Court of Appeals ruled that the Army Corps' jurisdictional determination was not subject to judicial review. *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs,* 543 F.3d 586, 597 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009). In that case, the Army Corps issued a final jurisdictional determination that all of the 2.1 acres of land the Borough intended to develop into playgrounds, athletic fields, restrooms, concessions, and related structures contained "waters of the United States." *Id.* at 589. The Borough unsuccessfully sought judicial review of the

jurisdictional determinations. The Ninth Circuit's holding that a jurisdictional determination is not a final agency action reviewable under the APA was identified by petitioner in the Petition in this case as one of the decisions creating a "three-way circuit split." *See* Pet. 12. Alaska Acting Attorney General Richard Svobodny explained why the state submitted an *amicus* brief in support of the Borough's petition for a writ of certiorari: "Property owners seeking to use their land cannot, in many instances, be sure of the land's wetland status and need a way to quickly and finally resolve that issue so that the time and money required to go through the permitting process are not unnecessarily wasted or do not become cause for the project to be abandoned." *State to File Amicus Brief in Support of Fairbanks North Star Borough*, ALASKA DEP'T OF LAW (March 23, 2009), *available at* http://www.law.state.ak.us/press/releases/2009/032309-AmicuNSB.html. Following this Court's denial of a petition, the Borough abandoned the project.

B. Amici's Role As Regulators Is Impacted.

The option of commencing a project and awaiting an enforcement action is "plainly an inadequate remedy." Pet. App. 14a. The Eighth Circuit noted the "substantial criminal monetary penalties and even imprisonment" that could be incurred from this strategy. *Id.* For Amici, as landowners, if they proceed with a project without obtaining a permit, they could face an additional potential penalty—the loss of federal grants, which are key sources of funding.[3] As a criterion for grant funding, a number

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[3] *See* OMB 2015 Report. The OMB noted that "[f]ederal grants help State and local governments finance programs covering most areas of domestic public spending including infrastructure,

of federal agencies' grants require that applicants comply with all applicable federal laws. For example, the United States Department of Transportation, United States Department of Health and Human Services, and the Federal Aviation Administration condition some sources of funding to state and/or local governments on full compliance with the federal statutes and regulations. *See, e.g.*, United States Dep't of Trans. Fed. Transit Author. ("FTA"), *Master Agreement* 2-3, 9-11 (2014); United States Dep't of Health & Human Servs., *Grants Policy Statement*, I-7 (2007); 2 C.F.R. 200.303(b) (any "non-Federal entity must [c]omply with Federal statutes, regulations, and the terms and conditions of the Federal awards."); *United Aerial Advert., Inc.*, 2000 F.A.A. 575 (2000) (Federal Aviation Administration withheld federal funds from a county for violating federal laws related to grant assurances and grant conditions). Therefore, if they choose to proceed with a project without a permit, a state and/or local governmental entity may risk losing the very funds they need to complete the work.

Indeed, the specter of losing federal funding has a significant impact on the development of state and local infrastructure projects. One Midwest county received funding from the Federal Highway Authority to replace two old bridge structures. *See* Matthew D. Chase, *Comments of the Nat'l Ass'n of*

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education, social services, and public safety." *Id.* at 266. The OMB concluded that in 2013, federal funds from both mandatory (through direct appropriations) and discretionary grants accounted for 29.8% of state budgets. *Id.* at 265. In 2014, OMB determined that the actual amount of federal grants to state and local governments was $577 billion. *See id.* at Table 15-1.

Counties Re: Definition of "Waters of the United States" Under the Clean Water Act 12 (Docket ID EPA-HQ-OW-2011-0880-15504) (Nov. 14, 2014), *available at* www.regulations.gov. The Army Corps determined that the project would impact three hundred feet of a roadside ditch that it considered to be jurisdictional wetlands. *Id.* Although the county disagreed with the Army Corps' determination, it nonetheless obtained a permit to avoid additional delay and the potential withdrawal of federal funding for the project. *Id.* The cost of the permitting process forced the county to reduce the scale of the project, and the final project was completed several months late. *Id.*

C. Amici's Role As Partners With Local Businesses In Economic Development Is Impacted.

Finally, Amici are required and empowered to provide short and long-term planning for their communities, which includes economic development and capital infrastructure projects, housing, recreation, and transportation planning. Their long-term growth plans are often implemented in partnership with private parties who develop projects within development zones, industrial parks, and targeted development areas. Amici can plan the strategy for growth, implement zoning restrictions to drive specific projects, plan for infrastructure improvements to support the growth, and issue necessary permits. However, the Army Corps could issue a positive jurisdictional determination that, if upheld, would preclude or interfere with the Amici's short and long-term development plans. All of the parties involved need the ability to seek prompt, definitive judicial review of that decision.

Faced with the alternatives of an expensive permit, a lengthy delay, or future enforcement action, private parties may decide to abandon these projects, depriving the communities of necessary investment and growth, and depriving the governments of the ability to responsibly manage their growth while protecting the definitive wetlands.

Recently, the potential designation of a portion of a property as a jurisdictional wetland forced a national retailer to abandon a planned development. Ikea, the Scandinavian furniture retailer, planned to construct an approximately 336,000 square-foot retail warehouse facility in the city of Brooklyn, Ohio. *See* U.S. Army Corps of Eng'rs Buffalo District, *Public Notice: IKEA Property, Inc. Application No. 2014-01023*, at 1-2 (Jul. 13, 2015), *available at* http://www.lrb.usace.army.mil/Portals/45/docs/regulatory/publicnotices/2015July/PN2014-01023OH.pdf. The planned development was going to be "more than a retail center" for this community. *See* Michelle Jarobe, *As Cleveland-Area Ikea Plan Falters, Brooklyn Points to Army Corps Snarls*, CLEVELAND.COM (Feb. 17, 2016), *available at http://www.cleveland.com/business/index.ssf/2016/02/as_cleveland-area_ikea_plans_f.html* (citations omitted). Local citizens expected the development to "'bring[] with it the ability to attract other investors who want to be around Ikea, itself. It's sort of like what McDonald's was 40 years ago. McDonald's went into a corner, and you saw three other people go into that corner.'" *Id.* (quoting Joe Roman, President and Chief Executive Officer of the Greater Cleveland Partnership). The Army Corps issued a preliminary jurisdictional determination for the eastern portion of the property, and conducted a site visit on the

western portion, concluding that there were approximately twenty-three acres of jurisdictional wetlands present between the two parcels. *See* U.S. Army Corps, *Public Notice: IKEA Property, Inc. Application No. 2014-01023, supra*, at 1-2. Ikea subsequently chose to terminate its efforts and agreements for the project, a decision which means a significant loss of opportunity for this community, including the loss of "'300-some jobs.'" *Id.* (quoting Andi Udris, Economic-Development Director in Brooklyn, Ohio). Situations such as this demonstrate the need for prompt judicial review of jurisdictional determinations, or local governments and businesses will be hindered in their ability to plan for and construct new development.

Similarly, when a large corporation plans to bring its corporate headquarters to a medium-sized city, much of state and local governments' work to prepare for this new development must be started, if not completed, well before the corporation opens its doors. A few thousand employees will relocate to this city. State and local governments must build roads, schools, parks, and sewer systems to be ready for the influx of workers. Expenses must be budgeted for and revenue must be raised. If state and local governments and investors have to wait to seek judicial review of a jurisdictional determination more is lost than just time as plans are postponed. Labor and materials costs may have increased, contractors may have moved onto other projects, federal funding and grants may no longer be available, interest rates may have increased, and budgeted tax dollars may have been spent on other projects. More importantly, the interested corporation may have moved on to another city, state, or even country.

In raising these examples, Amici take no position regarding the development of areas subject to federal jurisdiction, including the appropriate scope of that jurisdiction. Instead, these examples highlight that, absent prompt judicial review, a jurisdictional determination all too often becomes the final word on the scope of federal authority, increasing project costs, lengthening project timelines, and, in some instances, stifling community and economic development. Amici need the certainty provided by prompt judicial review of jurisdictional determinations to implement their planning mandates, and to facilitate and support community and economic development.

CONCLUSION

The Eighth Circuit Court of Appeals correctly held that jurisdictional determinations are final agency actions that are subject to judicial review under the APA. This allows state and local governments to manage limited budgets and effectively implement short and long-term growth and development planning strategies.

For the foregoing reasons, this Court should affirm the Eighth Circuit's decision.

Respectfully submitted,

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No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an approved jurisdictional determination ("AJD") finalized through the United States Army Corps of Engineers ("USACE" or "the Corps") administrative appeals process, 33 C.F.R. Part 331, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq*.

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INTERESTS OF *AMICI CURIAE*

Amici represent a broad cross-section of public and private sector entities subject to Clean Water Act ("CWA" or "the Act") regulation.[1] *Amici* frequently need AJDs from the Corps, and in this brief detail how AJDs directly affect choices they and others must make about their operations.

The Foundation for Environmental and Economic Progress ("FEEP") is a national coalition of landholding companies formed in 1989 to address federal environmental policies that affect the use of land and water. Its members are planned community developers, and companies engaged in forestry, mining, and agriculture. Foundation members own land in 44 states, and are deeply committed to environmental stewardship of their property.

The Utility Water Act Group ("UWAG") is a voluntary, ad hoc, non-profit, unincorporated group of 210 individual energy companies which own and operate over fifty percent of the nation's electric generating capacity, and three national trade associations which represent investor-owned utilities, publicly-owned utilities, and non-profit rural cooperatives. Supplying electricity throughout the country requires the construction and maintenance of electric generation facilities, substations, and thousands of

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[1] Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

miles of transmission and distribution lines and associated access roads, which must sometimes abut, rely on, or cross wetlands and other "waters of the United States." The administration of the CWA section 404 regulatory program, insofar as it affects the electric utility industry, is important not only to UWAG members but also to the public at large, whose health, safety and general welfare depend on the reliable delivery of electricity.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The public cannot identify what lands and waters constitute "waters of the United States" subject to CWA regulation. So the Corps has established a formal process to investigate a particular piece of property and then prepare an AJD that depicts in great detail – inches not acres – the boundaries of "waters of the United States." AJDs are explicitly "binding" on the Corps and the U.S. Environmental Protection Agency ("EPA") and will represent the government's position in subsequent litigation. Recipients use AJDs to plan the use of property, often in an effort to avoid or minimize impacts to "waters of the United States," and thereby avert or limit labyrinthine CWA permit procedures. AJDs are also relied upon in real property transactions, to establish value for tax and lending purposes, and by state and local governments to determine compliance with their own regulatory programs. Equally important,

AJDs expose recipients to enhanced penalties if the government initiates enforcement. Yet, if an AJD wrongly asserts CWA jurisdiction, what "remedy in a court" is adequate other than immediate review of the AJD? None.

APA Section 704 provides for judicial review of all final agency actions for which there is no other adequate remedy in a court. 5 U.S.C. § 704. The government argues AJDs are not judicially reviewable because they do not *direct* recipients to take any particular action. But AJDs establish sharp lines that have direct, powerful, and coercive effects on how their recipients proceed. Further, the government's proposed remedies – (1) first applying for a permit and then suing to prove no permit is needed, or (2) triggering an enforcement action by filling areas deemed jurisdictional and then litigating jurisdiction as a defense to the enforcement action – are nonsensical, time-consuming, and very costly. Certainly they are not adequate.

The government – as it has shown over the years – is prone to expansive jurisdictional claims. Congress enacted the judicial review provisions of the APA to provide a check on administrative extravagance. As a matter of sound statutory interpretation, sensible CWA policy, and fundamental fairness to citizens, the Court should hold that AJDs are subject to judicial review.

BACKGROUND: WHAT APPROVED JURISDICTIONAL DETERMINATIONS ARE AND WHY THEY ARE IMPORTANT.

The CWA is a strict liability statute that prohibits the "discharge" of any pollutant into "navigable waters" except in compliance with a permit issued under the Act. 33 U.S.C. § 1311. Section 404 authorizes the Corps to issue permits for the "discharge of dredged or fill material," including certain earth-moving activities such as the peat mining proposed in the case at bar. 33 U.S.C. § 1344.[2] The term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Violators of the Act are subject to civil penalties up to $37,500 per day, per violation, 78 Fed. Reg. 66,643, 66,647 (Nov. 6, 2013), and imprisonment for up to three years, 33 U.S.C. § 1319(c)(2), or both. EPA and the Corps also have powerful administrative enforcement tools such as compliance orders, notices of violation, and cease-and-desist orders, 33 U.S.C. § 1319(a); 33 C.F.R. § 326.3(c), and can assess administrative penalties up to $187,500. 78 Fed. Reg. at 66,647 (citing 33 U.S.C. § 1319(g)(2)(B)).

Accordingly, entities conducting any kind of activity on the landscape must tread lightly, taking care to identify any areas that may be deemed "navigable waters" and either avoiding such areas or obtaining a permit if they plan to discharge to them. The prob-

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[2] The CWA Section 404 permit program is administered jointly by the Corps and EPA.

lem is that in many cases it is very difficult to determine whether land contains "navigable waters," and if it does, the boundaries of those waters.[3] Identifying "navigable waters" involves a two-part inquiry – (1) whether the area in question meets the *physical* criteria to be a wetland or nonwetland water (*e.g.*, a tributary) within the meaning of applicable regulations, guidance, and policy, and (2) whether the wetland or nonwetland water meets the *legal* criteria to be "navigable waters."

Of course, a landowner who finds herself knee-deep in a swamp should be expected to surmise she may be in an area deemed a wetland subject to Corps regulation. But where does the wetland end? As this Court has noted, "[T]he transition from water to solid ground is not necessarily or even typically an abrupt one [w]here on [the] continuum to find the limit of 'waters' is far from obvious." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

Physical Uncertainty. Importantly, many areas that do qualify as "wetlands" under federal guidance are not at all like swamps. Under Corps guidance, an area may be deemed a "wetland" even if it is never wet at the surface. The underground water table need only rise to within 12 inches of the surface for a few days each year.[4] Thus, it is not surprising

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[3] "The reach of the Clean Water Act is notoriously unclear." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

[4] See, *e.g.*, USACE, ERDC/EL TR-10-16, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest*

that many people have no idea portions of their backyard qualify as wetlands. The Corps knows this is a problem. James S. Wakeley, USACE, ERDC/EL TR-02-20, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations*, 13 (Aug. 2002) (wetland conditions "may not be directly observable in the field and may require long-term study or specialized training and equipment to evaluate [] a particular site.").

Nonwetland waters – such as the dry washes, arroyos and coulees that criss-cross desert landscapes – are similarly challenging. The Corps uses the "Ordinary High Water Mark" ("OHWM") to identify such linear features, but there is no consistent method for recognizing the OHWM. One Corps official told the then U.S. General Accounting Office "that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments of the ordinary high water mark." U.S. Gen. Accounting Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, 22 (Feb. 2004). The problem persists to this day. See Matthew K. Mersel, USACE, *Development of Na-*

Region (Version 2.0), 75 (Aug. 2010); USACE, ERDC/EL TR-12-1, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region (Version 2.0)*, 85 (Jan. 2012). In the interest of brevity, the hyperlinks to the websites for the Regional Supplements, and other sources in this brief, have not been included since many documents are easily obtainable via internet search engine.

tional OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014) ("vague definition" leads to "[i]nconsistent interpretations of OHWM concept" which leads to "[i]nconsistent field indicators and delineation practices").

Legal Uncertainty. Even if the land in question has the physical characteristics of wetlands or non-wetland waters, significant uncertainty exists whether the property meets the legal criteria to be CWA "navigable waters." The reach of the CWA has been controversial since the statute was enacted in 1972.[5] The Court's most recent CWA jurisdictional cases rejected the agencies' expansive jurisdictional theories. *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*") (Corps jurisdictional claim over remote ponds impinges on States' traditional land and water authority contrary to explicit CWA language); *Rapanos* v. *United States*, 547 U.S. 715 (2006) (rejecting jurisdiction over "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States,'" *id.* at 742 (plurality op.); rejecting Corps standard that "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it ," *id.* at 781 (Kennedy, J., concurring)).

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[5] See, *e.g.*, *Nat. Res. Def. Council, Inc.* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975); *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989); *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997).

Earlier this year, the agencies promulgated a new rule announcing a new theory of jurisdiction that would recapture many areas this Court said were out of bounds in *SWANCC* and *Rapanos*. Dep't of the Army, Corps of Eng'rs & EPA, Clean Water Rule: Definition of "Waters of the United States," Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) ("WOTUS Rule"). That rule has been stayed by court order,[6] but if it ever takes effect, it will only compound the confusion.

The rule defines "tributary" to mean "a water that contributes flow" and has the physical indicators of bed, banks, and OHWM – a definition so broad that some have read it to capture municipal stormwater conveyances ("MS4s"), which consist of a network of "drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains." 40 C.F.R. § 122.26(b)(8). If the storm sewers are "waters of the United States," then the government would have the authority to regulate discharges *to* sewer systems (in addition to discharges *from* them).[7] While the rule expressly excludes

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[6] *In re EPA & Dep't of Def.*, 803 F.3d 804 (6th Cir. 2015).

[7] Jeremy P. Jacobs, *Concrete-lined river seen as regulatory quagmire for EPA*, E&E GREENWIRE, Feb. 1, 2016, at 4 ("[I]t's unclear whether all of the countless creeks, channels, and other stormwater conveyances stemming from the [Los Angeles] [R]iver that are almost always bone dry would qualify [as waters of the United States]."); see also Federal StormWater Association Comments on Proposed Definition of "Waters of the United States," at 10 (Nov. 14, 2014), EPA-HQ-OW-2011-0880-15161 ("the overly broad definition of 'tributary' may im-

stormwater control features "created in dry land," 80 Fed. Reg. at 37,105, the term "dry land" has not been defined.

Another new jurisdictional category in the WOTUS Rule ("adjacent waters") appears to reach many industrial basins, process water ponds, and other water features common in industrial operations. These features bear no resemblance to the navigable waters that Congress intended the CWA to protect. But if they are "waters of the United States," routine operation, maintenance, and repair at these facilities will require permits. Thus, it is critical to determine whether such areas are jurisdictional.

In light of these uncertainties, a layperson cannot confidently identify "waters of the United States" by herself. While "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property," *Hawkes Co.* v. *United States Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir.) (Kelly, J., concurring), *cert. granted*, 136 S. Ct. 615 (2015), the CWA is an exception. Even hiring an expert will not provide comfort because the Corps (or EPA) may not agree with the expert, and the agencies' regulations interpreting jurisdictional waters are so expansive and vague as to invite such disagreements. In *United States* v. *Lipar*, for example, the landowner began development in an area a consultant had identified as nonjurisdictional. No. H-

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properly treat MS4s not as conveyance systems but as jurisdictional waters.").

10-1904, 2015 U.S. Dist. LEXIS 115821, at *2-3 (S.D. Tex. Aug. 30, 2015), *appeal docketed*, No. 15-20625 (5th Cir. Oct. 29, 2015). EPA, however, disagreed, and brought an enforcement action. *Id.* at *11. After five years of litigation, the district court determined that the area was not jurisdictional. *Id.* at *13.[8] *Amici* are aware of numerous similar situations in which a landowner relied in good faith on an expert's report to avoid jurisdictional waters by staying within areas the consultant had concluded were not "waters of the United States," only to face an enforcement action claiming the areas in question were in the agency's view jurisdictional.

AJDs Dispel Uncertainty. Accordingly, the only way a person can be confident the Corps and EPA will not question a jurisdictional determination on a given piece of property is to ask the Corps to issue an AJD. An AJD is a "definitive, official determination that there are, or that there are not jurisdictional 'waters of the United States' on a site." USACE, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations, at 5 (June 26, 2008) ("RGL 08-02"). It "precisely identifies the limits of those waters [and] can be relied upon by a landowner, permit applicant, or other 'affected party' for five years." *Id.* at 1, 2.[9] An AJD may be requested by a landown-

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[8] See also Compl. ¶ 46, *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014) (No. 2:13-cv-02095-KJM-AC).

[9] In "extraordinary circumstances, such as an [AJD] based on incorrect data provided by a landowner or consultant," an AJD may be revised. RGL 08-02 at 2.

er, permit applicant or other "affected party"[10] and once issued is "binding on the Government and represent[s] the Government's position in any subsequent federal action or litigation regarding the case."[11] In particular it "can be used and relied on if a CWA citizen's lawsuit is brought challenging the legitimacy of that JD or its determinations." RGL 08-02 at 2. AJDs are "final agency action" under the Corps's regulations, 33 C.F.R. § 320.1(a)(6), and may be appealed through the Corps's administrative appeals process, 33 C.F.R. Part 331, Appendix C, as was the AJD in this case.

For Fiscal Year 2016, Congress appropriated $200 million to make sure the Corps has the resources necessary to make these detailed determinations.[12] In preparing an AJD, the Corps conducts an extensive investigation of the chemical, biological, hydrological and landscape characteristics of the site in

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[10] "Affected party" means "a permit applicant, landowner, a lease, easement or option holder (*i.e.*, an individual who has an identifiable and substantial legal interest in the property) .." 33 C.F.R. § 331.2.

[11] Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act at 1 (Jan. 19, 1989) ("1989 MOA").

[12] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division D, Title I, 129 Stat. 2242, 2399 (2015). These monies will support the completion of "136,000 final actions," approximately 56,000 of which are jurisdictional determinations. USACE, Civil Works Budget and Performance, Budget StrongPoint FY 2016, Regulatory (Feb. 2, 2015).

question. The site work is carried out in accordance with a 60-page "Jurisdictional Determination Form Instructional Guidebook," recorded on a seven-page "Approved Jurisdictional Determination Form," and posted to a public website. USACE, ORM Jurisdictional Determinations and Permit Decisions, http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO.

For example, on one 6,500-acre site depicted in Exhibit 1 below, the Corps determined there were 1,458 acres of "waters of the United States" scattered among 165 discrete wetland polygons ranging in size from 0.03 acre to 354.7 acres.

Exhibit 1



Another jurisdictional determination – on an 1,800-acre site in Arizona – claimed jurisdiction over 43 discrete drainages, ranging in depth from half an inch to 45.8 inches, in width from 3 to 50 feet, and in length from 100 to 9,160 feet. Determinations on smaller properties are similarly detailed. A property in Virginia, 66 acres in size, contained 16 discrete wetland areas totaling 28 acres, the smallest being 0.003 acre or 150 square feet. In short, an AJD is a highly detailed, site-specific depiction of CWA jurisdiction on a given property.

For those who can make do with less precision, the Corps offers a Preliminary Jurisdictional Determination ("PJD"). PJDs are "written indications that there *may* be waters of the United States [including wetlands] on a parcel or indications of the *approximate* location(s) of waters of the United States .." 33 C.F.R. § 331.2 (emphases added). In contrast to an AJD, a PJD is "advisory in nature," *id.*, "non-binding," and cannot be appealed. RGL 08-02 at 3.

People choose AJDs over PJDs when they want to be sure they can rely on the precise lines the Corps has drawn. They may want to establish the value of the land for tax purposes or perhaps in connection with the conveyance of the property. They may be evaluating options for future uses of the property, or designing a site plan for immediate development. The AJD provides certainty where previously the existence, extent, and location of CWA jurisdiction was uncertain. Accordingly, the AJD becomes the basis for the choices the landowner, operator, lender, local

regulator or other "affected party" makes about the property.

In this way, the AJD is a key instrument advancing the overarching policy of the Section 404 program, *viz*: to avoid impacts to jurisdictional features whenever possible.[13] By telling the landowner where jurisdictional features lie, the AJD allows a project proponent to avoid or minimize adverse impacts. In the best case, the site development plan can avoid all adverse impacts, which means the project proponent does not have to pursue a permit, and the Corps does not have to process an application. A public policy trifecta: important aquatic features are saved, the developer is spared the time and expense of the permit process, and the Corps's workload is reduced.

ARGUMENT

Pursuant to the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. Like agency action previously held to be reviewable under the APA by this Court, AJDs have immediate and substantial consequences for the recipient and if incorrect, need to be set aside promptly by the Judicial Branch. Yet the government persists in arguing that an AJD is not final, and that APA review is barred because the "affected party" has two other "ade-

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[13] Memorandum of Agreement Between the EPA & the Dep't of the Army, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, at 2 (Feb. 6, 1990); see also 40 C.F.R. §§ 230.10 *et seq.*

quate" remedies in a court. The Court of Appeals properly rejected the government's cynical arguments, and this Court should affirm that, once an AJD has been through the administrative appeals process, the recipient may challenge the government's assertion in court. Allowing judicial review will cultivate administrative consistency, provide citizens a means of redress for unlawful agency determinations, and foster public confidence in the fairness of the regulatory regime.

I. Approved Jurisdictional Determinations Are Final Agency Action Under the Administrative Procedure Act.

In construing the APA's language, this Court has emphasized that the "legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140-41 (1967) (citations and footnote omitted).[14]

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[14] The APA's generous review provisions were also clearly on the Court's mind during the *Sackett* oral argument. Tr. of Oral Arg. at 41, 50, *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062) ("*Sackett* Oral Arg. Tr.") (Breyer, J.) ("for 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite...the government here is fighting 75 years of practice ").

This Court's cases have consistently held that agency action is final if it is definitive and has a direct, immediate, and practical impact on the parties. See *Frozen Food Express* v. *United States*, 351 U.S. 40, 44 (1956) (agency action is final if it "has an immediate and practical impact"); *Abbott Labs.*, 387 U.S. at 151-52 (agency action is reviewable if it is "definitive" and [has] a "direct and immediate effect on the day-to-day business of [the complaining parties]."); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Labs.*); *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (agency action reviewable if it is action "by which 'rights or obligations have been determined' or from which 'legal consequences will flow'").

The government argues that agency action is not reviewable unless it *directs* a citizen to take action. Pet'r's Br. at 17, 26, 27, 31, 42, 43, 44. But the key question from the cases is whether the challenged action has a practical effect on day-to-day operations or becomes the basis for ordering the recipient's affairs. Certainly government action that directs a particular recipient to take action is reviewable under the standard, see *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) (holding Compliance Order directing respondent to "restore" land is reviewable), but, contrary to the government's argument, that is not the only kind of action that warrants APA review.

A. Agency Action Is Final If It Is Definitive and Has a Direct, Immediate, and Practical Impact.

APA caselaw demonstrates that an AJD's immediate practical effects are more than sufficient to satisfy APA judicial review requirements.[15] In *Frozen Food Express*, motor carriers sought judicial review of an Interstate Commerce Commission ("ICC") determination that certain commodities did not qualify for an agricultural exemption. 351 U.S. at 41. Similar to jurisdictional determinations, the order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott Labs.*, 387 U.S. at 150 (summarizing the facts in *Frozen Food Express*). Yet, the Court noted:

> The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact ..[It] warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties ..The determination is not therefore abstract, theoretical or academic ..[It] is, indeed, the basis for carriers in ordering and arranging their affairs.

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[15] Courts agree and the government concedes that AJDs are the consummation of the agency's decisionmaking process. *Belle Co., L.L.C.* v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383, 388 (5th Cir. 2014); *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008); Pet'r's Br. at 26. No further discussion regarding this issue, therefore, is necessary.

Frozen Food Express, 351 U.S. at 43-44. An AJD carries a similar warning, and, like the ICC order, becomes the basis for recipients in ordering their affairs. See also *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 418 (1942) (people "conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails").

Likewise, in *Abbott Labs.*, the Commissioner of Food and Drugs issued regulations requiring pharmaceutical companies to put generic names on labels and advertisements describing the names and ingredients of their drugs. The government argued that although the requirements were issued as regulations, they were not reviewable because the rules could only be enforced by civil or criminal actions brought by the Attorney General. But the Court held the rules were nonetheless reviewable because "they have the status of law and violations of them carry heavy criminal and civil sanctions." 387 U.S. at 152. Therefore, they created a "dilemma" that had a "direct effect on the day-to-day business" of the drug companies. *Id.* "Either they must comply with the requirement and incur the costs or they must follow their present course and risk prosecution." *Id.* (internal quotation marks omitted).

The recipient of an erroneous AJD faces a similar dilemma: either acquiesce in a jurisdictional determination she believes is incorrect (and forgo use of lands erroneously characterized as "waters of the United States" or incur the costs of applying for a permit she should not be required to obtain), or initi-

ate development and risk facing "serious criminal and civil penalties." *Id.* at 153. The Court saw judicial review as a solution to the dilemma in *Abbott Labs.*; similar reasoning applies here.

More recently, the Court held in *Bennett* that a Fish and Wildlife Service Biological Opinion ("BO" or "Opinion") concerning the operation of a Bureau of Reclamation dam was final agency action within the meaning of the APA. 520 U.S. 154 (1997). The government argued that the BO was not final agency action because the Bureau was "not legally obligated" to adopt the "reasonable and prudent alternatives" identified by the BO. *Id.* at 177 (quoting Br. for Resp'ts at 33). Importantly, the *Bennett* Court recognized that, while the Opinion "theoretically serves an 'advisory function' in reality it has a powerful coercive effect." *Id.* at 169 (internal citation omitted). "The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees) [risking] substantial civil and criminal penalties, including imprisonment." *Id.* at 170. Here, as in *Bennett*, while the Hawkes Co. is technically free to disregard the AJD and proceed with its proposed action, it does so at its own peril, risking substantial civil and criminal penalties for an unauthorized discharge.

The government tries to avoid the power of these seminal cases by analogizing AJDs to "informal agency opinion letters and other statements." Pet'r's Br. at 33. First, as discussed above, there is nothing "informal" about AJDs. They are the product of a

carefully prescribed site-specific investigation the results of which are reported in a prescribed format on a prescribed form. And they are not mere opinions; they bind the agencies.[16] But, more importantly, the form of agency action is not dispositive. Even an "informal decision" by an agency may be subject to judicial review. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) (recognizing a letter, written by an EPA Regional Administrator notifying PPG that their waste-heat boilers are subject to the Clean Air Act, is reviewable under the APA).[17] Thus, any implication by Petitioner that informal agency action is *never* subject to judicial review is false. [18]

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[16] Indeed, AJDs are far more formal, and require far more investigation, than the Compliance Order held reviewable in *Sackett* which was issued "on the basis of any information available" to EPA. 33 U.S.C. § 1319(a).

[17] Justice Stevens explained that the "informal advice" was reviewable because, among other reasons, "PPG would have to risk sizeable penalties in order to challenge EPA's determination in enforcement proceedings." *Harrison*, 446 U.S. at 603-04 (Stevens, J., dissenting on other grounds).

[18] In a similar vein, the government argues that AJDs are not reviewable because they are not self-executing and lack independent legal effect. But the Court has repeatedly rejected these attempts to bypass the APA. *Sackett*, 132 S. Ct. at 1373 ("the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."); *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970) (rejecting the "argument that the order lacked finality because it had no independent effect on anyone").

B. Approved Jurisdictional Determinations Have the Requisite Effects to Be Final Agency Action.

The government tries to downplay the importance of AJDs. It characterizes them as a "salutary administrative practice" voluntarily undertaken for the benefit of the public – nothing more than the Corps's "non-binding view" of CWA jurisdiction at a particular location. Pet'r's Br. at 20, 23, 41. But this is just wrong. An AJD *is* binding. See *supra* note 11 and accompanying text; RGL 08-02 at 2 (an AJD "can be used and relied on if a CWA citizen's lawsuit is brought challenging the legitimacy of that JD or its determinations."). The government having bound itself to their determination, expects that the "affected party" will rely on it. As the government explains in its brief, an AJD provides "the property owner more information on which to base its own assessment of its statutory obligations" and therefore "may influence the landowner's choice among alternative courses of conduct." Pet'r's Br. at 36-37. And, as described below, it does. Indeed, why would Congress appropriate and the Corps spend millions of taxpayer dollars on completing AJDs if they were as ineffectual as the government now claims?[19]

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[19] *Supra* note 12.

AJDs Affect Site Development Plans. In keeping with the Section 404 policy to avoid and minimize wetland impacts, the "affected party" typically uses the AJD to design a site plan that maximizes avoidance. Exhibit 2 demonstrates how this works. Exhibit 2-A depicts the location of 14 discrete wetland areas across a 375-acre site in the southeastern United States. The wetlands range in size from 0.11 acre to 2.7 acres. Exhibit 2-B shows that the development plan for the site was strongly influenced by the jurisdictional map. Thus, the street in the north end terminates in a cul-de-sac to avoid wetland A; the street in the northeast side curves around wetlands B and D; a gap in development appears in the center of the map to avoid wetlands G and N; and the building lots to the southwest are arranged to avoid impacts to wetlands H, I, J, K, L, and M.

Exhibit 2-A

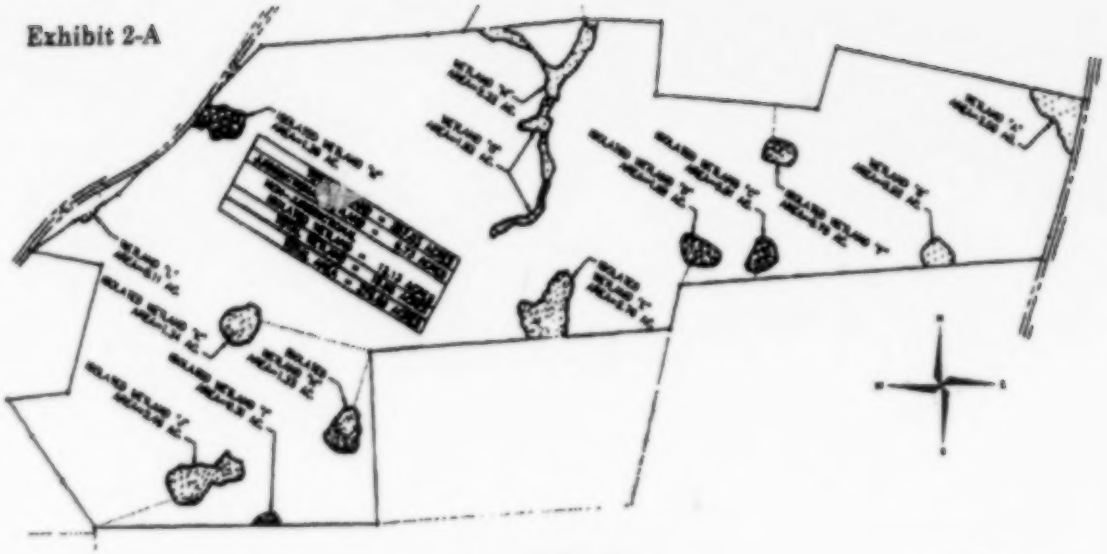
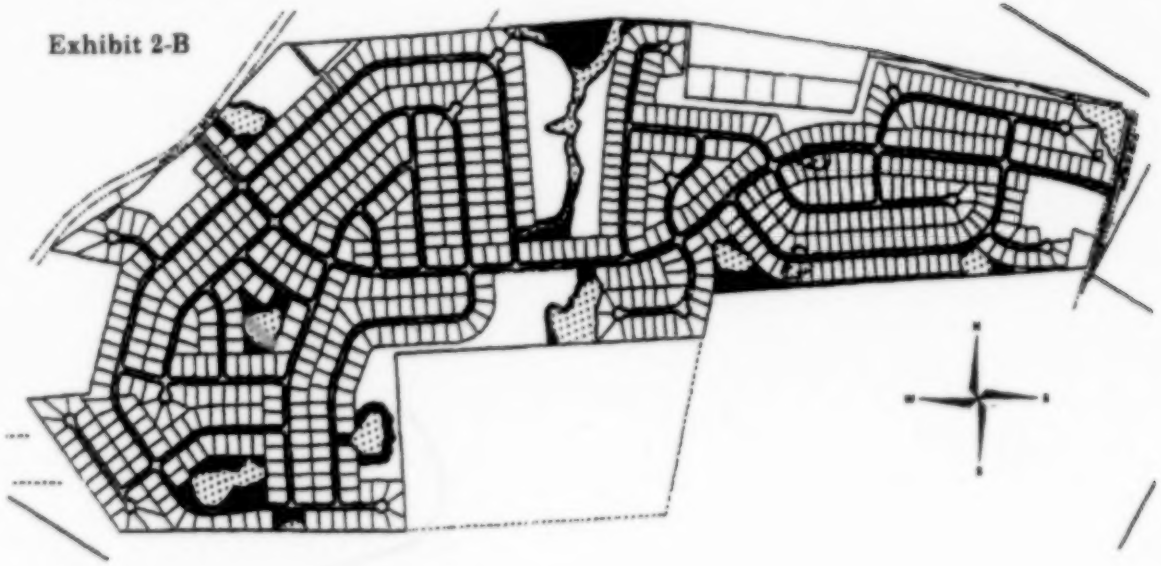


Exhibit 2-B



AJDs Affect Property Value. AJDs can tangibly affect a person's day-to-day operations outside of the development setting as well. In one case of which *Amici* are aware, the appraisal value of mortgaged land in the Mid-Atlantic was reduced from over $32 million to about $1 million when the Corps determined that the land contained "waters of the United States," and the lender demanded additional collateral. AJDs may impact property values, thereby affecting tax assessments and even in some cases triggering U.S. Securities and Exchange Commission reporting requirements under 17 C.F.R. § 229.103(5). See, *e.g.*, *Bergen Cnty. Assocs.* v. *Borough of E. Rutherford*, 12 N.J. Tax 399, 408, 411, 418 (N.J. Tax Ct. 1992) (land that had been valued at $47,500,000 reduced to $2,029,800 based on determination that land was jurisdictional). Indeed, the potential for these kinds of effects is borne out by a declaration prepared in response to the government's brief and discussed more fully *infra*. Declaration of Professor David L. Sunding, Ph.D. ¶ 7 (attached) ("Sunding Decl.") ("jurisdictional determination[s] that increase the expected cost of development will reduce the property's current market value.").

AJDs Affect State and Local Regulatory Requirements. Other effects abound. In Louisiana, for example, an AJD is a material fact that must be disclosed in real estate transactions. If "any part of the property [has] been determined a wetland by the [Corps]," then the seller must disclose it to the buyer. Louisiana Property Disclosure Document for Residential Real Estate, at 1 of 4 (Rev. 02/01/15); LA.

REV. STAT. ANN. § 9:3198(A)(1) (2013). Some states require AJDs before issuing water quality certifications and "base their fees on the extent of impacts to waters of the United States." Questions & Answers on RGL 08-02, at 8.

State and local agencies in South Carolina rely on Corps jurisdictional determinations in implementing their own programs. For example, the City of Charleston uses the "Corps of Engineers approved wetland delineation line" to calculate minimum lot sizes and to locate required buffers around jurisdictional areas. City of Charleston, Subdivision Concept Plan Submittal Checklist, at 2. Horry County and the City of Beaufort require a verified Corps jurisdictional determination as a condition precedent of plat approval.[20] South Carolina's Department of Health and Environmental Control ("DHEC") relies on AJDs in authorizing stormwater discharges from construction sites. S.C. DHEC, National Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activities, § 2.6.2 (2013). Small changes in the size and location of Corps jurisdiction can affect DHEC permit requirements. See *Deerfield Plantation Phase II B Prop. Owners Ass'n* v. *S.C. DHEC*, 777 S.E. 2d 817 (S.C. 2015). Likewise, in California, local land use agencies use AJDs to assess aquatic features and calculate mitigation requirements under the California Environmental Quality Act. See Newport Ban-

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[20] Horry Cnty., S.C., Code of Ordinances, ch. 18, art. 2, §§ 3-4(C), 4-1 (2015) and Beaufort, S.C., Unified Development Ordinance, App. at 9-10 (revised Sept. 14, 2012).

ning Ranch, Draft Envtl. Impact Report (Sept. 8, 2011).

AJDs Can Affect Penalties. Especially significant is an AJD's potential effect on civil and criminal penalties when the government brings an enforcement action.[21] 33 U.S.C. § 1319(c)(2). The government says that the civil penalty and criminal provisions do not "assign any particular evidentiary weight to" a jurisdictional determination. Pet'r's Br. at 32. The provisions do, however, emphasize "knowledge" and "good faith efforts to comply" as important factors in determining penalties. 33 U.S.C. §1319 (a), (c). Moreover, the government's brief admits that "[a] landowner's knowledge that the agency believes the CWA applies could be offered as evidence of the owner's knowledge of the CWA's applicability," Pet'r's Br. at 32, and the government acknowledged during oral argument in *Sackett* that courts commonly impose higher penalties based on knowledge: "[I]t is often the case that what district courts will do is impos[e] a greater penalty because it shows greater culpability to continue with the violation after you've been warned." *Sackett* Oral Arg. Tr. at 29.[22] Knowledge is at the crux of the

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[21] The risk of criminal penalties is not theoretical. See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993) (three years' imprisonment); *United States* v. *Ellen*, 961 F.2d 462, 464 (4th Cir. 1992) (six months' imprisonment).

[22] See *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 261 F.3d 810, 816-819 (9th Cir. 2001) (significant civil penalty for ignoring jurisdictional features on wetland delineation map), *aff'd*, 537 U.S. 99 (2002); *United States* v. *Feinstein Family P'ship*, No. 96-232-CIV-FTM-24(D), 1998 U.S. Dist. LEXIS

penalty provisions. Therefore, one cannot imagine a future enforcement action in which a positive AJD would not be offered as evidence to demonstrate the defendant's knowledge that the CWA applied to his or her property.

AJDs Affect Permit Type and Mitigation Costs. By identifying the limits of jurisdictional waters on a property, an AJD directly affects whether the landowner may qualify for a streamlined general permit, such as a nationwide permit ("NWP"). NWPs are available for certain projects that have "only minimal adverse environmental effects," 33 U.S.C. § 1344(e), and as the Corps has acknowledged "[m]any project proponents will design their projects to comply with the [acreage] limit so that they can qualify for an NWP and receive authorization more quickly than they could through the standard permit process." 65 Fed. Reg. 12,818, 12,821 (Mar. 9, 2000). The more jurisdictional waters on a given parcel of land, the harder it will be for a landowner to qualify for an NWP Therefore, by identifying the extent of jurisdictional areas, an AJD "directly affect[s] the investment and project development choices of those whose activities are subject to the CWA." See *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*,

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23963, at *29 (M.D. Fla. Oct. 28, 1998) (substantial civil penalty because defendants knowingly disregarded CWA permitting requirements); *United States* v. *Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (violation of cease-and-desist letter justifies substantial civil penalty); *Hanson* v. *United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (substantial administrative penalty owing in part to violation of cease-and-desist order).

417 F.3d 1272, 1280 (D.C. Cir. 2005); see also *supra* Exhibits 2-A and 2-B.

Additionally, under Corps regulations, "all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts." 33 C.F.R. § 320.4(r)(2). Although mitigation costs vary widely, mitigation provided through mitigation banks and in-lieu-fee programs ranges from $41,572 to $111,985 per acre of wetlands mitigated, and from $95 to $1,000 per linear foot of stream mitigated. [23] Thus, a legal determination of what constitutes "waters of the United States" will result in both physical and financial costs for the "affected party."

* * *

An AJD is, at once, a legal assertion of authority and a detailed geographical declaration of regulated waters whose consequences cascade throughout all levels of federal, state, and local government. Its influence on future uses of the property is undeniable. As was the case with the labeling requirement in *Abbott Labs.*, the exemption determination in *Frozen Food Express*, and the Biological Opinion in *Bennett*, an AJD can technically be disregarded, but only at the peril of substantial civil and criminal liabilities.

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[23] U.S. EPA & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule at 40 (May 20, 2015), EPA-HQ-OW-2011-0880-20866.

This is precisely the kind of dilemma Congress sought to alleviate when it built the generous review provisions into the APA.

II. There Is No Other Adequate Remedy in a Court for Approved Jurisdictional Determinations.

The APA establishes that final agency action "for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704. The government contends there are adequate paths to dispute an AJD that incorrectly identifies jurisdictional waters. First, the government suggests that the permitting process itself is "the primary avenue of obtaining judicial review of a jurisdictional determination." Pet'r's Br. at 45. In other words, a landowner who disagrees with the Corps's final determination – *i.e.*, an AJD that has been affirmed through the administrative appeals process, 33 C.F.R. Part 331, Appendix C – should apply for a permit, file an administrative appeal of the permit decision, see 33 C.F.R. Part 331, Appendix A, and then sue on the permit decision and litigate the validity of the AJD through judicial review of the permit. Second, as an alternative remedy, the government proposes that the recipient of an incorrect AJD initiate development without a permit, trigger an enforcement action and then litigate jurisdiction as a defense in an enforcement action. See Pet'r's Br. at 50.

To accept the government's argument, the Court would have to redefine the word "adequate."

In truth, there is no other adequate remedy in a court. A landowner should not have to go through an entire permit process to demonstrate that she is not subject to the permit requirement.[24] Moreover, the permit application process is not a vehicle to amend jurisdiction. It is designed to determine whether a permit can be issued and to define the terms and conditions of the permit, not whether jurisdiction exists in the first place. Nor is the government's second proposed remedy any better. Forcing a citizen to risk criminal and civil liability in order to test the validity of a questionable government action is hypocritical and irresponsible. Congress, by enacting the APA, plainly afforded a better way.

A. Judicial Review of a Permit Is Not an Adequate Remedy for an Unlawful Approved Jurisdictional Determination.

The government's first alternative remedy – pursuing a permit and then challenging the permit in court – assumes that everybody who seeks an AJD wants to develop their property immediately. Just go ahead, the government suggests, apply for a permit and see what happens. If the recipient can work with the permit, then nobody will need to address the jurisdictional issue. Aside from the bland indifference to the substantial costs and time associated

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[24] It "seems very strange for a party to apply for a permit on the ground that they don't need a permit at all." *Sackett* Oral Arg. Tr. at 14 (Alito, J.).

with the permitting process, this notion makes no sense for a person who seeks an AJD, for example, before purchasing a piece of property. See, *e.g.*, *Dep't of Transp.* v. *La Salle Nat'l Bank*, 623 N.E.2d 390, 399 (Ill. App. Ct. 1993) ("[A] reasonably prudent and knowledgeable buyer would be 'crazy' not to investigate for the presence of jurisdictional wetlands."). Consigning these individuals to the permit process and then challenging the result is no remedy.

Moreover, the permitting process is not a vehicle to review or amend an AJD. The purpose of the permitting process is to determine whether a permit can be issued and to define the terms and conditions of the permit. To be clear, an AJD, because it determines the amount and location of jurisdictional features, will strongly influence those permit terms and conditions. But the process of obtaining an AJD and the process of obtaining a permit are two separate and discrete functions. See 33 C.F.R. pt. 325; see also 33 C.F.R. pt. 331, Apps. A, C (two separate administrative appeals processes, as well). Further, an AJD, once finalized, is binding on the government. 1989 MOA at 1; RGL 08-02 at 2. It cannot be changed – through the permit process or anywhere else. Rather, if the Corps has issued an AJD, that document becomes a polestar for the permit process. Thus, rather than providing a remedy for an erroneous AJD, the permit process is just an expensive and unproductive obstacle to judicial review.

The government spends four pages of its brief trying to convince the Court that the 404 permit process

is a walk in the park and to discredit a study[25] cited by the Court in *Rapanos*, 547 U.S. at 721 (plurality op.), which showed just how difficult it is to go through that process. Pet'r's Br. at 46-50. Attached to this brief as an Appendix is a declaration by the author of that study, David L. Sunding, Professor and Thomas J. Graff Chair of Environmental and Resource Economics, University of California, Berkeley, responding briefly to the government's allegations. Paragraph four of the declaration states that the study showed "it takes the typical project developer over 788 days to prepare and negotiate an individual permit, and that the typical nationwide permit takes 313 days to obtain." Sunding Decl. ¶ 4. The government criticizes the study for including "the time the applicant takes to prepare the application," Pet'r's Br. at 47 n. 10, and instead tries to focus the Court's attention on the amount of time the Corps takes to process the application after it deems the application "complete."

But this is a red herring. The key issue under the APA is whether the *recipient* has an adequate remedy in court, and surely the amount of time and money he or she must devote to the permit process is relevant to the "adequacy" of this proposed remedy (not the amount of time the Corps spends). Here, for example, the Corps told the Hawkes Co. that it would require nine additional studies, including expert sci-

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[25] David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59 (2002) ("Sunding Article").

entific and biological assessments, before the application would be deemed complete. Pet'r's J.A. at 33-34.

The government also claims it was "particularly inappropriate" for the Court to rely on Professor Sunding's cost figures because they were skewed by larger projects driving up the "average cost." Pet'r's Br. at 49 & n. 12. Professor Sunding's declaration explains how the sample was assembled, and, further, that "the projects in [the] sample are not atypically large or small." Sunding Decl. ¶ 6. The government also says the *median* cost for an individual permit was $155,000, "much lower" than the *mean* cost cited in *Rapanos*.[26] Pet'r's Br. at 49 n. 12. Perhaps $155,000 seems trivial to the Federal government, but to an individual permit applicant this *is* surely a significant cost. And Professor Sunding's declaration shows that the costs are far higher today. "[A]pplying the Consumer Price Index (CPI) inflation rate to the cost figures reported in my 2002 article the typical individual permit cost $386,392 to obtain, and the typical nationwide permit cost $41,137." Sunding Decl. ¶ 3.

Finally, judicial review, via the permitting process, is only available after exhausting all administrative remedies. According to Corps regulations at 33 C.F.R. Part 331, a permit appeal is supposed to

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[26] The "average applicant for an individual permit spends $271,596 in completing the process, and the average applicant for a nationwide permit spends $28,915 – not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 721 (plurality op.) (citing Sunding Article).

take no more than 150 days, but the Corps's division websites show that, from 1999 to the present, nationwide, on average, permit appeals decided on the merits took 306 days.[27]

In sum, applying for a permit is not an other adequate remedy in a court under the APA. The government's "remedy" forces the "affected party" to apply and perhaps receive a permit it never needed in the first place and then to decline the permit to challenge jurisdiction. This roundabout process is unreasonable. The "affected party" should have the opportunity in the first instance to demonstrate the area in question is not "navigable waters."

B. Judicial Review in the Context of an Enforcement Action Is Not an Adequate Remedy for an Unlawful Approved Jurisdictional Determination.

As an additional "remedy," the government makes the astonishing suggestion that a citizen, if she is "sufficiently confident" that a "relevant site does not contain 'waters of the United States,'" may initiate development and then challenge jurisdiction once an enforcement action is brought. Pet'r's Br. at 16. There is a lot wrong with this argument.

First, it assumes that the government will initiate an enforcement action that allows for judicial re-

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[27] See, *e.g.*, USACE, South Atlantic Division, Table of Appeals, http://www.sad.usace.army.mil/Missions/Regulatory/RegulatoryAppeals/TableofAppeals.aspx.

view. Whether it does so is entirely within the government's discretion, however. The government knows, after *Sackett*, that a Compliance Order will be subject to judicial review at the behest of the recipient. But the government has numerous other administrative enforcement tools, and our post-*Sackett* experience suggests they will choose those that elude judicial review. In *Duarte Nursery*, 17 F. Supp. at 1020, for example, the government issued a cease-and-desist letter to a farmer in the central valley of California and then claimed that the letter "was merely a suggestion, not a command. No one forced Duarte to stop working his wheat field That was simply his own choice." Robin Abcarian, *This case is enough to furrow a farmer's brow*, LOS ANGELES TIMES, Jan. 15, 2016, at B2.; see also Mem. of Points & Authorities in Supp. of Fed. Def.'s Mot. to Dismiss Compl. at 8-11, *Duarte Nursery, Inc.* v. *U.S. Army Corps of Eng'rs*, 17 F. Supp. 3d 1013 (E.D. Cal. 2014) (No. 2:13-cv-02095-KJM-AC). In the same vein, *amici* have seen more proposed Administrative Orders on Consent in which the government claims illegal discharges are occurring in "navigable waters" and then offers to settle administratively on the condition that the respondent agree not to challenge jurisdiction in court. In short, enforcement is a "remedy" only if the government chooses to allow it to be a remedy.

Moreover, given the government's theory that CWA violations continue each day the fill remains in place, the government retains all power and control in determining when and where to "drop the ham-

mer." *Sackett*, 132 S. Ct. at 1372. Once the "affected party" disturbs the ground, the threat of government enforcement will continue indefinitely.

Finally, allowing oneself to become the defendant in an enforcement case entails other substantial risks. An enforcement action for violation of environmental laws will likely tarnish the reputation of the defendant, and may as the Court stated in *Abbott Labs.* harm the recipient "severely and unnecessarily." 387 U.S. at 153. As the Court observed in *Sackett*, "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the [Corps's] jurisdiction." 132 S. Ct. at 1374. It is astonishing, then, that the government would suggest that an individual should be required to trigger an enforcement action carrying very substantial penalties in order to test the validity of the government's jurisdictional claim. We thought *Ex parte Young* laid that poor idea to rest more than a century ago. 209 U.S. 123, 130, 142 (1908) (holding the statute denied due process because any challenger would be subject to severe penalties and "ruinous consequences").

* * *

In sum, without APA judicial review, the "affected party" faces three equally onerous choices – to avoid

using the broad swaths of land the Corps has incorrectly determined are jurisdictional, to seek a permit, or to proceed without a permit and later face very large fines. This is exactly the kind of situation the APA was enacted to address.

For sound policy reasons that animate the APA, the affected parties should have the opportunity to challenge in court jurisdictional determinations they believe are incorrect. The government suggests that allowing judicial review would "strain the Corps' limited resources" and the "Corps might reconsider the practice, or at least revisit its willingness to provide an [AJD] to anyone who requests it." Pet'r's Br. at 24. The government's threat, however, is based on the false premise that AJD recipients will challenge an overwhelming number of jurisdictional determinations. But, except in the most egregious cases, most people do not want to go to court. They too have limited resources and time, and would rather spend those resources on productive activity, be it land development, land sale, or fixing an appraisal for tax purposes. The government's concern is overblown,[28] and in no way alters the reviewability of AJDs under the APA.

Furthermore, "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 132 S. Ct. at 1374. The point of judicial review is to foster an

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[28] The government made the same argument in *Sackett*, but we have not seen a flood of lawsuits challenging Compliance Orders.

agency commitment to consistent adherence to applicable rules, and to allow citizens to hold them accountable when they stray, even if it means, at times, the agency must expend additional resources. This is the promise of the APA. Congress knew unreviewable authority would breed extravagant claims of jurisdiction, and "would in effect be blank checks drawn to the credit of some administrative officer or board." S. REP. NO. 752 at 26 (1945). Thus it enacted APA Section 704 to give citizens the right to ensure their government would be "put to the test." *Sackett* Oral Arg. Tr. at 54 (Roberts, J.).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 2, 2016

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APPENDIX

APPENDIX

No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Declaration of Professor David L. Sunding, Ph.D.

I, David L. Sunding, declare as follows:

1. I am currently a professor in the Department of Agricultural & Resource Economics at the University of California, Berkeley, and hold the Thomas J. Graff Chair in Environmental and Resource Economics. In addition to my position at Berkeley, I am a principal in the litigation practice of The Brattle Group in the San Francisco office. Prior to my current positions, I served as a senior economist on President Clinton's Council of Economic Advisors. I have also served on panels of the National Research

Council and the U.S. Environmental Protection Agency Science Advisory Board.

2. In 2002, I published *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NATURAL RESOURCES J. 59 (2002), that analyzed the costs to obtain a discharge permit issued under Section 404 of the Clean Water Act. This article was cited by the Supreme Court in *Rapanos* v. *United States*, 547 U.S. 715 (2006). I calculated the typical out-of-pocket expense incurred by applicants. These costs result from the need to conduct scientific investigations, negotiate with the U.S. Army Corps of Engineers over the conditions of the permit, and redesign the proposed project based on the Corps' final decision.

3. The data collection and analysis was performed in 1999. Translating my findings to 2015 dollars, I concluded that the typical individual permit cost $386,392 to obtain, and the typical nationwide permit cost $41,137. These figures do not include the cost of mitigation and were obtained by applying the Consumer Price Index (CPI) inflation rate to the cost figures reported in my 2002 article.

4. In my article, I also concluded that it takes the typical project developer 788 days to prepare and negotiate an individual permit, and that the typical nationwide permit takes 313 days to obtain. These times are measured from the date at which the applicant begins preparing the permit application, and not merely the amount of time that the Corps takes

to render a decision once the application is deemed to be complete.

5. The data analyzed to reach these conclusions resulted from a detailed examination of 103 individual and nationwide permit applications. I obtained a list of public sector projects from the National Association of Counties and a list of private sector projects through phone interviews with developers and wetlands consultants.

6. Summary statistics from the resulting dataset indicate that the sample was representative of the entire population of Section 404 permits in important respects. The data in the sample come from a roughly even mix of private and public applicants (52 percent public agency applicants and 48 percent private). The projects included in the sample reflect the wide range of activities authorized by Section 404 permits: school construction, quarry expansion, sediment containment, home building, street improvements, and flood control. The distribution of the projects in the sample according to acres impacted and total project acreage is also representative of national averages: the average project size in my sample is 1.95 acres and the average amount of wetland acres impacted is 0.23. Thus, the projects in my sample are not atypically large or small.

7 Mainstream microeconomic theory tells us that in equilibrium, the market value of land equals the capitalized value of the future income stream received by the property owner. In cases where the land has potential for development, the anticipated

costs of development will affect the property's current market value. Thus, actions such as a jurisdictional determination that increase the expected cost of development will reduce the property's current market value. In this sense, a jurisdictional determination by the Corps has an immediate economic consequence, even if the proposed development may occur years in the future.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on February 11, 2016.

/s/ David L. Sunding

David L. Sunding, Ph.D.

No. 15-290

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In The

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. § 1362(7); *see* 33 U.S.C. § 1251 *et seq.*, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF HAWKES

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondents.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states.

Since its creation in 1977, MSLF and its attorneys have been actively involved in litigation regarding the proper interpretation and implementation of the Administrative Procedure Act ("APA"), 5 U.S.C.

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

§ 551 *et seq. E.g.*, *Mountain States Legal Found. v. Nat. Wildlife Fed'n*, 497 U.S. 1020 (1990). In fact, a substantial portion of the cases in which MSLF attorneys provide representation involved clients who are challenging agency action under the generous judicial review provisions of the APA. *E.g.*, *Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 2015); *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011), *as amended* (Mar. 7, 2012); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007); *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998); *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997).

MSLF and its attorneys have also been – and are currently – involved in litigation regarding the proper interpretation and implementation of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq. E.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, ___ U.S. ___, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, ___ U.S. ___, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *In re U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.*, No. 15-3839, 2016 WL 723241 (6th Cir. Feb. 22, 2016) ("*In re: Definition of 'Waters of the United States'*"); *Johnson v. U.S. EPA*, No. 15-147 (D. Wyo.). MSLF brings a unique perspective to the case at bar by addressing the APA's presumption of judicial review, the courts' interpretation of the APA as providing for broad judicial review, and the

importance of judicial review to protect private property owners from unlawful agency action.

STATEMENT OF THE CASE

The CWA grants the Corps jurisdiction to regulate discharges into navigable waters, or "waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7). Under the CWA, a permit is required for certain discharges into waters of the United States. 33 U.S.C. § 1342. The CWA imposes fines and penalties for unpermitted discharges, and knowing violations can incur civil and/or criminal penalties to the tune of $50,000 a day and up to three years imprisonment. 33 U.S.C. § 1319(c).

Hawkes Co., Inc. wishes to mine peat from a 530-acre property in northwestern Minnesota owned by two affiliated companies (collectively, "Hawkes"). Petitioner's Appendix ("Pet. App.") at 1a, 5a. Hawkes met with the Army Corps of Engineers ("Corps") to discuss agency jurisdiction and, exercising an abundance of caution, also applied for a CWA permit. Pet. App. at 6a. The Corps issued an approved jurisdictional determination concluding the subject property was a water of the United States because of its "significant nexus" to the Red River, a traditional navigable water some 120 miles away. Pet. App. at 7a. Hawkes timely filed an administrative appeal of the approved jurisdictional determination. Pet. App. at 7a. On appeal, the jurisdictional determination was

reversed, but the Corps issued a revised jurisdictional determination with essentially the same information and findings.[2] Pet. App. at 7a, 45a-47a.

Hawkes filed suit seeking judicial review of the jurisdictional determination as a final agency action under the APA. Joint Appendix ("Joint App." at 7-8). The Corps filed a motion to dismiss, and the district court granted that motion. Pet. App. 20a-31a. The Eighth Circuit Court of Appeals reversed and rejected the district court's reliance on *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008) and *Belle Co., L.L.C. v. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014) as contrary to this Court's decision in *Sackett*. Pet. App. 11a-16a. Under *Sackett*, the Eighth Circuit held that a jurisdictional determination is a final agency action for which there is no other adequate judicial remedy under 5 U.S.C. § 704. Pet. App. 16a-17a. The Corps timely filed a petition for writ of certiorari. To resolve the circuit split, this Court granted certiorari.

SUMMARY OF ARGUMENT

The narrow issue presented by this case is whether the Corps has overcome the APA's strong presumption favoring judicial review of agency action.

[2] The revised jurisdictional determination stated that it was a "final Corps permit decision in accordance with 33 C.F.R. § 331.10." Pet. App. at 45a.

As the legislative history of the APA demonstrates, Congress intended the APA's judicial review provisions to be an important check on federal agencies' proclivity to exercise their powers arbitrarily or assume powers not granted. Indeed, Congress recognized that, in some circumstances, judicial review would be the only available protection against unwarranted governmental expansion into citizens' private lives.

The practical effect of a jurisdictional determination demonstrates that it does not fall within one of the APA's limited, enumerated exceptions to judicial review. The Corps' argument that a jurisdictional determination is not final agency action eschews the pragmatic interpretation of finality mandated by this Court, fails to appreciate the measurable legal consequences that flow from issuance of a jurisdictional determination, and ignores the Corps' own treatment of the jurisdictional determination as binding and final. The direct and immediate impact of the jurisdictional determination on Hawkes' use of its private property for peat mining *ipso facto* demonstrates that such determination constitutes final agency action.

The thrust of the Corps' argument rests on its erroneous attempt to distinguish between agency orders that compel affirmative action – which the Corps concedes are subject to judicial review – and agency orders that prohibit regulated parties from taking otherwise lawful action, which the Corps asserts are not subject to judicial review. The Corps' view of the APA conflicts with countless other

interpretations of the finality requirement of 5 U.S.C. § 704 and ignores the fundamental right of property owners to use their private property.

Finally, judicial review of agency actions such as jurisdictional determinations serves important public policy interests, especially in the context of agency attempts to assert jurisdiction under the CWA. In the absence of judicial review, agencies will be able to strong-arm private property owners into compliance with their decisions – no matter how arbitrary or abusive – because of the lack of other adequate remedies. Therefore, judicial review of jurisdictional determinations is necessary to protect regulated parties from agency overreach.

ARGUMENT

I. THE APA PROVIDES A BROAD PRESUMPTION FAVORING JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

The APA provides a right of judicial review of all "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.[3] Thus, the

[3] There are only two limited exceptions to the APA's broad provision of judicial review: (1) where the statute precludes review; and (2) where agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(1), (2); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("The APA, by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' and applies universally

(Continued on following page)

APA "creates a 'presumption favoring judicial review of administrative action. '" *Sackett*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). Recently, this Court unanimously emphasized that "Congress *rarely* intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, ___ U.S. ___, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)) (emphasis added). And while the presumption is rebuttable, the agency bears a "'heavy burden'" to show that a plaintiff is not entitled to judicial review. *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (holding that a "right of action" is "expressly created" by 5 U.S.C. § 704 "absent some clear and convincing evidence" to the contrary).

When Congress passed the APA, it did so in hopes of reining in what President Roosevelt referred to as the "'fourth branch' of the Government for which there is no sanction in the Constitution." S. Doc. No. 79-248, at 299 (1946). Senator McCarran, the architect of the bill, described one of the APA's four main functions as "set[ting] forth a simplified

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'except to the extent that [§ 701 applies].'") (quoting 5 U.S.C. §§ 704, 701(a)). The Corps has not asserted that either 5 U.S.C. § 701 exception applies here.

statement of judicial review designed to afford a remedy for *every* legal wrong." *Administrative Procedure Act: Hearings on S. 7 Before the House and Senate*, 79th Cong. 2d Sess. 304 (1946) ("*Hearings*") (emphasis added). In recommending the bill to Congress, the Senate Judiciary Committee stated that judicial review was "indispensable[,] since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted." S. Rep. No. 79-752, at 217 (1945). Congress's adoption of the APA recognized that judicial review is deeply rooted in American jurisprudence, and to allow the "barnacle growth" of unchecked agency authority could "foul[ ]" "the ship of state" and "endanger[ ]" "our institutions." S. Doc. No. 79-248, at 350 (1946); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("[W]hat is there, in the exalted station of an officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim ?").

It is apparent from the APA's legislative history that Congress viewed judicial oversight of agency actions as the central mechanism by which the APA would protect Americans from agency overreach and abuse. S. Doc. No. 79-248, at 305 (1946) (Senator McCarran emphasizing that judicial review is "something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs and for the enforcement of human

rights."); *id.* at 347 (Representative Michener stating that "[t]he only aim and purpose of this bill is to see that the rank and file of American people receive the justice which our system of jurisprudence attempts to guarantee to them."). And this Court has consistently interpreted the APA as requiring judicial review of almost all agency actions. *See Heckler v. Chaney*, 470 U.S. 821, 843-44 (1985) (Marshall, J., concurring) ("The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA]'s 'generous review provisions' must be given a 'hospitable interpretation.'" (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977))); *Califano*, 430 U.S. at 104 (The APA "undoubtedly evinces Congress['s] intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.").

Thus, the APA affords broad judicial review of agency action unless: (1) the agency action is not final; (2) existing statutes preclude judicial review; or (3) the agency action is committed to agency discretion by law. 5 U.S.C. §§ 701(a)(1), (2), 704. Only upon a showing of "'clear and convincing evidence'" that one of these exceptions applies "should the courts restrict access to judicial review." *Abbott Laboratories*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). The limited exceptions to judicial

review in the APA demonstrate Congress's intent that such review serve as "a check against excess of power and abusive exercise of power in derogation of private right." Final Report of Attorney General's Comm. on Administrative Procedure, S. Doc. No. 8, at 76 (1941); *see also Hearings* at 307 ("In light of the great expansion of governmental activities into the private lives of our citizens, some protection of the citizen against these agencies should be provided. It is long overdue." (statement of Sen. Reed)).

Congress also intended agency action to be considered final for purposes of judicial review "whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704; *Administrative Procedure Act, Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong., 1st Sess. 76 (1945) (statement of Sen. McCarran); *cf. Darby v. Cisneros*, 509 U.S. 137, 137 (1993) (federal courts do not have the authority to require exhaustion of administrative remedies before a plaintiff may seek judicial review under the APA, where neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review). There is no indication in the legislative history that Congress intended the finality requirement to be applied in a "hypertechnical fashion" – to the contrary,

"the legislative history of [5 U.S.C.] § 704 suggest[s] that Congress was merely codifying the self-imposed judicial practice of exercising restraint in reviewing tentative agency action." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 n.7 (D.C. Cir. 1986). The APA's broad presumption of judicial review is therefore the starting point for any inquiry regarding an agency's claim that its action is not yet final. *Bland v. United States*, 412 U.S. 909, 912 (1973) (Douglas, J., dissenting from denial of certiorari) ("[U]nder the [APA] judicial review of the exercise of executive discretion is the rule and unreviewability is the exception." (internal quotation omitted)).

II. A JURISDICTIONAL DETERMINATION UNDER THE CWA IS THE QUINTESSENTIAL FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW UNDER THE APA.

A. A Jurisdictional Determination Is Final Agency Action.

Although judicial review under the APA is available only for "final" agency actions, 5 U.S.C. § 704, the APA's finality requirement is interpreted in a "flexible" and "pragmatic way." *Abbott Laboratories*, 387 U.S. at 149-51; *see also Ciba-Geigy*, 801 F.2d at 435 & n.7 (recognizing that 5 U.S.C. § 704 does not "convey[ ] some settled, inflexible meaning that precludes pragmatic or functional considerations."); *Board of Trade of City of Chicago v. S.E.C.*, 883 F.2d 525, 530 (7th Cir. 1989) ("'Finality' is a practical concept[ ]" that takes into consideration whether the

regulated individual or entity must "dance to [the agency's] tune"). The "core question" in determining finality "is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). In *Bennett*, this Court synthesized its prior precedents into a two-pronged inquiry, holding that agency action is final if it: (1) represents the consummation of agency decision-making on the matter; and (2) fixes legal rights or obligations, or is one from which legal consequences will flow. 520 U.S. at 177-78.

In the case at bar, the Corps concedes that the first prong of the *Bennett* test is satisfied. Corps' Br. at 25-26. However, the Corps argues that an approved jurisdictional determination under the CWA is not final because it does not "impose legal consequences" under the second *Bennett* prong. Corps' Br. at 26. The Corps' argument eschews a "pragmatic" interpretation of the finality requirement in favor of a rigid view that requires the plaintiff to demonstrate "legal consequences" or "penalties" as a result of the agency action. Corps' Br. at 26. Under the Corps' myopic interpretation, the jurisdictional determination is divorced from the CWA – the statute under which the Corps issued the jurisdictional determination in the first place – because any obligation to avoid discharge of pollutants into "waters of the United States" flows independently from the CWA itself, rather than the jurisdictional determination. Corps'

Br. at 27. According to the Corps, the jurisdictional determination merely expresses the Corps' opinion that a pre-existing obligation to avoid such discharges exists. Corps' Br. at 27-28.

In determining whether the agency action at issue "fixes legal rights or obligations," or is one from which legal consequences flow, *Bennett*, 520 U.S. at 177-78, this Court looks primarily to whether the agency's position is "definitive" and whether it has a "'direct and immediate effect on the day-to-day business'" of the parties challenging the action. *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (quoting *Abbott Laboratories*, 387 U.S. at 152). Final agency actions have "the status of law" and "immediate compliance with their terms [is] expected." *Abbott Laboratories*, 387 U.S. at 152. A jurisdictional determination is clearly "definitive" in that it is the agency's final word on a specific property's jurisdictional status, and such determination will not be reconsidered during the CWA permitting process. *Sackett*, 132 S. Ct. at 1374 (agency's determination "that it has regulatory authority over [the] property" is a "definitive[ ]" ruling on that question) (Ginsburg, J., concurring). A jurisdictional determination also clearly conveys the impression that "compliance [is] expected" because the Corps does not contend that private property owners are free to disregard the jurisdictional determination and commence peat mining without consequences. *See Abbott Laboratories*, 387 U.S. at 151. To the contrary, violations for discharges into waters of the United States without a permit can

incur civil and/or criminal penalties of $50,000 a day and up to three years imprisonment. *See* 33 U.S.C. § 1319(c). As the D.C. Circuit has recognized, where a landowner "will be subject to an enforcement action and fines" if it does not conform to the agency's view – here, that Hawkes' property contains jurisdictional wetlands – then "the finality of [the agency's] position is clear enough." *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 47-48 (D.C. Cir. 2000).

This Court has also considered whether the challenge to agency action presented a legal issue "fit for judicial resolution" and whether the parties bringing the challenge "represented almost all the parties affected," in which case, "'a pre-enforcement challenge [is] calculated to speed enforcement' of the relevant Act." *Standard Oil*, 449 U.S. at 239 (quoting *Abbott Laboratories*, 387 U.S. at 150). A final agency action is "'a final and binding determination'" rather than "'a tentative recommendation.'" *Bennett*, 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798). The jurisdictional determination at issue here is analogous to other final agency actions. For example, in *Bennett*, the agency action at issue was a biological opinion and accompanying incidental take statement issued by the Fish and Wildlife Service ("FWS").[4] *Id.*

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[4] Notably, the biological opinion and incidental take statement at issue in *Bennett* were far more attenuated than the jurisdictional determination at issue here because they did not purport to apply to individual regulated parties but instead applied to other agencies. 520 U.S. at 157.

at 157. This Court held that the FWS's action met the second prong of its test because the action "alter[s] the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." *Id.* at 178. Much like the legal effects that flowed from the biological opinion in *Bennett*, the legal effects that flow from the jurisdictional determination here is that Hawkes is able to commence peat mining activities if (but only if) it applies for and receives a CWA permit. Petitioner's Appendix ("Pet. App.") at 11a-13a; *see* Pet. App. at 83a (Jurisdictional determination expressly rejecting Hawkes' position that the land at issue was not a "waters of the United States"). Thus, the jurisdictional determination is "'a final and binding determination'" rather than "'a tentative recommendation[.]'" *Bennett*, 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798); *see also Ciba-Geigy Corp.*, 801 F.2d at 436 ("Once the agency publicly articulates an unequivocal position and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review."); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980) (Agency's decision was final when it "rendered its last word on the matter.").

An analogous circuit court decision is *Center for Native Ecosystems v. Cables*, 509 F.3d 1310 (10th Cir. 2007), where the Forest Service had issued annual operating instructions ("AOIs") but not grazing permits for a specific area. *Id.* at 1328-29. Environmental

groups challenged the AOIs as final agency action under the APA. *Id.* The Tenth Circuit held the second prong of the *Bennett* test was satisfied because the AOIs set forth certain findings independent from – and not available in – the grazing permits, and thus conferred certain legal obligations. *Id.* at 1330. The court explained that AOIs are the agency's "last word" and "undoubtedly have clear and definite consequences" on regulated parties. *Id.* The same rationale is applicable to the jurisdictional determination here: While a CWA permit has not yet been granted or denied, the CWA permit process does not offer any opportunity for revision of the jurisdictional determination, and the Corps characterizes the jurisdictional determination as a discrete agency decision distinct from a CWA permit. Corps' Br. at 8-10.

Issuance of a jurisdictional determination also "presents a 'legal issue fit for judicial resolution.'" *Center for Native Ecosystems*, 509 F.3d at 1330 (*Standard Oil*, 449 U.S. at 239). The jurisdictional determination at issue here is the Corps' stand-alone pronouncement of the jurisdictional status of Hawkes' property. Corps' Br. at 8-10. Thus, judicial review would not disrupt any ongoing administrative process. *See Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983) (Agency action is final notwithstanding "[t]he possibility of further proceedings in the agency" on related issues, so long as "judicial review at the time [would not] disrupt the administrative process.").

The Corps argues that its jurisdictional determination is not final agency action because it is the

CWA that requires landowners to obtain permits to discharge into waters of the United States, not the jurisdictional determination. *See* Corps' Br. at 27 This argument is unavailing, because it contradicts the Corps' treatment of jurisdictional determinations as binding during its permit process.[5] *Compare Fairbanks*, 543 F.3d at 593 ("An approved jurisdictional determination upheld on administrative appeal is the agency's 'last word' on whether it views the property as a wetland subject to regulation under the CWA." (quoting *Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987))), *with Bennett*, 520 U.S. at 178 (agency recommendations that are "binding" are final agency action). An agency's treatment of its own decision as final is a clear indication that it is, in fact, final.

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[5] Additionally, because Hawkes' allegations must be taken as true for purposes of the Corps' motion to dismiss, this Court must take as true Hawkes' contention that their property does not contain jurisdictional wetlands that fall within the definition of "waters of the United States" under the CWA. *See* Joint App. at 8; *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (in considering a motion to dismiss, the court "assum[es] the factual allegations are true"); *Nietzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations."). Therefore, it is the jurisdictional determination that (erroneously) purports to impose a permitting requirement on Hawkes, not the CWA. Pet. App. at 13a ("[T]he [jurisdictional determination] alters and adversely affects [Hawkes's] right to use [its] property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA.").

Whitman v. American Trucking Associations, 531 U.S. 457, 478-79 (2001). Indeed, even where an agency "has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior [may] bel[y] the claim that its interpretation is not final." *Id.* (holding that EPA's "interim implementation policy" for national ambient air quality standards was final, given the agency's refusal to reconsider it in subsequent rulemakings, representation to commenters that its interpretation was conclusive, and adoption of the interpretation under the heading "final decision").

As a practical matter, the jurisdictional determination is final as to its effect on Hawkes' inability to use its property. Indeed, whether Hawkes chose to apply for a permit or proceed with peat mining without a permit and face the consequences, a jurisdictional determination would undoubtedly form the basis of the Corps' permitting process or, alternatively, the Corps' enforcement action. *See Frozen Food Exp. v. United States*, 351 U.S. 40, 44 (1956) (Agency decision is not "abstract, theoretical, or academic" where it forms "the basis for [regulated entities] in ordering and arranging their affairs."). When an agency decision is practically treated as final and binding as to both the agency and regulated parties, as jurisdictional determinations are, the impact "is sufficiently direct and immediate as to render the issue appropriate for judicial review. " *Abbott Laboratories*, 387 U.S. at 152.

Moreover, legal consequences flow from a site-specific jurisdictional determination because it "substantially increase[s] the risk of regulation or enforcement relating to particular property."[6] *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 13-14 (D.C. Cir. 2011); *see also First Nat. Bank of Chicago v. Comptroller of Currency of U.S.*, 956 F.2d 1360, 1364 (7th Cir. 1992) (holding that comptroller's opinion letter to bank was final agency action because "the bank requested not advice, perhaps on a purely hypothetical course of action, but permission to go forward with a concrete proposal. The Comptroller turned the bank down. He did not offer a merely tentative view."). Thus, jurisdictional determinations are not only "definitive," but also have a "direct and immediate effect on the day-to-day business" of affected property owners because they constitute direct pronouncements on the Corps' jurisdiction over the subject property. *See Abbott Laboratories*, 387 U.S. at 151-52.

The Corps repeatedly argues that, if judicial review of jurisdictional determinations is permitted, the Corps (and other agencies) will be discouraged from issuing jurisdictional determinations or conducting

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[6] As a practical matter, even if the Corps does not bring an enforcement action, a jurisdictional determination *ipso facto* subjects Hawkes to a greater risk of litigation under the CWA's citizen suit provisions because a decree that the subject property contains waters of the United States would provide the basis for such suit. 33 U.S.C. § 1365; *see, e.g.*, *Decker*, 133 S. Ct. at 1326.

other agency actions not mandated by statute. Corps' Br. at 24-25 (Asserting that, if jurisdictional determinations are considered final agency actions, "the Corps might reconsider the practice, or at least revisit its willingness to provide an approved jurisdictional determination to anyone who requests it."). However, this is the exact same argument unanimously rejected in *Sackett*, 132 S. Ct. at 1374, where the EPA "warn[ed] that [it] is less likely to use [compliance] orders if they are subject to judicial review." This Court reasoned, "[t]hat may be true – but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.* And, as with the compliance order at issue in *Sackett*, judicial determinations will remain an effective means of informing private property owners of the presence of judicial waters of the United States in cases where "there is no substantial basis to question their validity." *Id.* The Corps' desire to issue jurisdictional determinations without fear of judicial review is not sufficient reason to deprive Hawkes of its day in court. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) ("[T]hat a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution, for convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government." (quotations and alteration omitted)).

B. There Is No Adequate Remedy In Court Following The Issuance Of A Jurisdictional Determination.

The APA provides that judicial review under the APA is available where "there is no other adequate remedy in a court. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. The Corps argues that, although Hawkes has exhausted its administrative remedies and the jurisdictional determination is now final, Hawkes has other adequate recourse because it may now apply for a CWA permit.[7] Corps' Br. at 44-45. Then, the Corps argues, "[w]hen the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision" and may argue at *that* time that the jurisdictional determination was erroneous. Corps' Br. at 45.

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[7] Alternatively, the Corps argues that Hawkes may decline to apply for a permit and may wait for the Corps to bring an enforcement action. Corps' Br. at 50. *Sackett* essentially rejected this option as an adequate remedy. *Sackett*, 132 S. Ct. at 1372 (noting that each day the regulated parties "wait for the agency to drop the hammer" following the issuance of a compliance order, "exorbitant civil and criminal penalties accrue"); *see also id.* at 1375 (The CWA's "draconian penalties for the sort of violations alleged in this case" leave property owners "with little practical alternative but to dance to the [agency's] tune.") (Alito, J., concurring).

As a preliminary matter, the very fact that the Corps has an administrative appeal process in place to review jurisdictional determinations and that Hawkes exhausted its administrative remedies counsels in favor of judicial review. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is 'final for purposes of [5 U.S.C. § 704]' and therefore 'subject to judicial review.' " (quoting 5 U.S.C. § 704)). Furthermore, the Corps' proffered "remedy" would be onerous and wasteful, and it fails to address Hawkes' contention that it is not legally required to apply for a CWA permit in the first place.[8] Upon receiving the Corps' judicial determination, Hawkes would face the unenviable choice of either proceeding with the CWA permit process – which Corps employees advised Hawkes would be costly, lengthy, and ultimately futile; *see* Pet. App. at 6a-7a – or proceeding with peat mining activities and facing civil and/or criminal penalties of up to $50,000 per day for knowing violations of the CWA (not to mention imprisonment for up to three years). *See* 33 U.S.C. § 1319(b), (c). Surely the APA's provision of judicial review sought to avoid exactly this Hobson's

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[8] As Judge Kelly noted in her concurrence below, "what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an 'adequate remedy.' " Pet. App. at 20a.

Choice. *See Bland*, 412 U.S. at 912 (Douglas, J., dissenting from denial of certiorari) ("One needs no reminder that government too can be lawless, that government cannot lead the way in law and order when it is the great malefactor. The [APA] is indeed part of the citizen's arsenal against lawless government.").

According to this Court, the "adequate remedy" requirement merely "makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The Corps fails to explain how judicial review of a jurisdictional determination would duplicate existing procedures – there are no "special statutory procedures" in place regarding jurisdictional determinations. *Id.* Indeed, as the Corps vehemently argues, there is no authorization in the CWA for jurisdictional determinations at all. Corps' Br. at 3-4. Moreover, the Corps' interpretation is in stark contrast to Congress's clear intent in including the "adequate remedy" proviso: "The second sentence of [5 U.S.C. § 704] was designed 'to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available. '" *Attorney General's Manual on the Administrative Procedure Act*, 103 (1947) (quoting S. Doc. No. 79-248 at 37 (1946)) (listing as examples "intermediate orders such as orders setting matters for hearing"); *see, e.g.*, *Western Radio Services Co., Inc. v. Glickman*, 123

F.3d 1189, 1196-97 (9th Cir. 1997) (Forest Service's notice proposing construction of an access road was not final agency action because it was preliminary to a decision whether to build the road); *Northcoast Environmental Center v. Glickman*, 136 F.3d 660, 669-70 (9th Cir. 1998) (holding that the Forest Service's preliminary research and development efforts to manage a specific tree do not constitute final agency action). The jurisdictional determination at issue was clearly not preliminary or intermediate. It purports to settle, once and for all, the question of whether the Corps has jurisdiction over Hawkes' property under the CWA. By the Corps' own characterization, it was final and binding, Pet. App. at 45a, and Hawkes exhausted the administrative review process before filing suit. Pet. App. at 8a. Therefore, the jurisdictional determination constituted final agency action for which there was no other adequate remedy, and the Corps has failed to overcome the APA's strong presumption of judicial review.

III. THE CORPS' ATTEMPT TO LIMIT JUDICIAL REVIEW UNDER THE APA TO AGENCY ACTIONS THAT COMPEL AFFIRMATIVE ACTION IS UNSUPPORTED BY THE CASE LAW AND IS IN DEROGATION OF PRIVATE PROPERTY RIGHTS.

The court below properly rejected the Corps' attempt to distinguish "between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action." Pet.

App. at 11a. The Corps would have this Court effectively limit *Sackett* to its facts and hold that, unless an agency action immediately imposes civil and/or criminal penalties on the regulated party, it is not final agency action under the second *Bennett* prong. *See* Corps' Br. at 25-27 (arguing that, until the recipient of a jurisdictional determination discharges pollutants at the relevant site and the agency decides to initiate enforcement proceedings, agency action is not final because the jurisdictional determination "does not contain any directives" or "alter the landowner's exposure to penalties").[9]

The Corps' proffered interpretation contradicts the basic principle that a party "may challenge [a] regulation without waiting for enforcement proceedings." *Herr*, 803 F.3d at 822 ("[C]ourts 'normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law.'" (quoting *Free Enter. Fund*, 561 U.S. at 490-91)); *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974)

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[9] As the court below recognized, the jurisdictional determination does in fact alter Hawkes' exposure to penalties. Pet. App. at 14a-15a ("Because appellants were forthright in undertaking to obtain a permit, choosing now to ignore the [jurisdictional determination] and commence peat mining without the permit it requires would expose them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation."). This impact is sufficient to render the jurisdictional determination final agency action. *See Sackett*, 132 S. Ct. at 1372 (the fact that an agency action exposed the regulated parties "to double penalties in a future enforcement proceeding[ ]" demonstrated that the second *Bennett* prong was satisfied).

(plaintiff was not required to violate statute and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a statute). The Corps' interpretation of the APA is also contradicted by the lower courts' frequent grants of judicial review to challenges of agency action that do not compel regulated parties to take affirmative action. *See, e.g.*, *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982-83 (9th Cir. 2006) (rejecting agency's argument that action is not final because it "is not a rule, order, license, sanction, or relief[ ]"); *Center for Native Ecosystems*, 509 F.3d at 1330 (annual operating instructions are final because they are "the last word before grazing begins and undoubtedly have clear and definite consequences for permittees, who need to make their plans based on what the [annual operating instructions] authorize"); *Minard Run*, 670 F.3d at 247-49 (agency statement that prohibited the exercise of private mineral rights was final agency action subject to judicial review); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (Rejecting Corps' argument that nationwide permits were not final agency action because the Corps did not deny authorization to specific dischargers, and holding that nationwide permits "are not a definitive, but otherwise idle, statement of agency policy – they carry easily-identifiable legal consequences for would-be dischargers."); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (Holding that EPA guidance is final agency action because it

"reflect[s] a settled agency position which has legal consequences both for agencies administering their permit programs and for companies who must obtain permits in order to continue operating."). Each of these cases applied *Bennett*'s two-prong test, and none of them held that an agency's action must compel affirmative action in order to be considered final under 5 U.S.C. § 704.

Moreover, the Corps' interpretation ignores the simple fact that Hawkes' right to own property is a hollow right indeed without the right to use it. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) ("For what is the land but the profits thereof?" (internal quotation omitted)); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("For practical purposes, the right to coal consists in the right to mine it. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."). This Court has recognized that imposing restrictions on the right to use property is a slippery slope. *Lucas*, 505 U.S. at 1014 (If "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" (quoting *Pennsylvania Coal Co.*, 260 U.S. at 415) (alterations in original)). It makes no practical difference to Hawkes whether the Corps' action is tantamount to an order that compels affirmative action, as in *Sackett*; or an order that

prohibits otherwise lawful action, as in this case. Either way, the agency's action "requir[es] land to be left substantially in its natural state heighten[ing the] risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018. And in either situation, "the property owners are at the agency's mercy." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). Thus, judicial review of agency action is warranted regardless of whether the action at issue requires affirmative action or prohibits otherwise lawful action.

IV. BROAD JUDICIAL REVIEW OF AGENCY ACTION SERVES IMPORTANT PUBLIC POLICY INTERESTS.

As a matter of public policy, the APA's presumption of judicial review is more important today than ever before. There is an "evolution toward increasingly informal decisionmaking processes" underway in federal agencies. E. Gates Garrity-Rokous, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 Yale L. J. 643, 656 (1991); Richard E. Levy *et al.*, *Administrative Procedure and the Decline of the Trial*, 51 U. Kan. L. Rev. 473, 502 (2003) ("[W]ithin both general categories of agency decisionmaking – rulemaking and adjudication – the trend has been toward increasingly informal procedures."). In *Sackett*, the EPA sought to characterize its compliance order as nonfinal "in light of 'informal discussion' and invit[ing] contentions of

inaccuracy[,]" but this Court unanimously rejected that characterization as relevant, stating that those features "do[ ] not suffice to make an otherwise final agency action nonfinal." 132 S. Ct. at 1372. As Justice Alito noted in his concurrence, the *Sackett* issue arose because Congress had failed to "provide a reasonably clear rule regarding the reach of the Clean Water Act" and "the EPA ha[d] not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase[,]" so the agency had resorted to "informal guidance."[10] *Id.* at 1375 (Alito, J., concurring).

The Corps attempts to characterize a jurisdictional determination as analogous to "various types of informal agency guidance that courts have generally found to be non-'final' under the APA." Corps' Br. at 17 However, the lower courts have rejected agency attempts to avoid judicial review merely by labeling its action "informal." *See, e.g.*, *Barrick Goldstrike Mines*, 215 F.3d at 47-48 ("[W]e reject[ ] the proposition that if an agency labels its action an 'informal' guideline it may thereby escape judicial review under the APA." (citing *Better Gov't Ass'n v. Dept. of State*, 780 F.2d 86, 93 (D.C. Cir. 1986))); *see also First Nat. Bank of Chicago*, 956 F.2d at 1364 (letter from Comptroller offering an interpretation of banking

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[10] The informal guidance defining "waters of the United States" is now in rule form, but is currently enjoined pending judicial review. *See In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015).

regulations was final agency action regardless of how "formal" it appeared); *Ciba-Geigy*, 801 F.2d at 436-39, 438 n.9 (a letter from an agency official stating the agency's position and stating the steps the regulated party would need to take to be in compliance constituted final agency action). And, even if the Corps' characterization were taken at face value, it should not be able to evade judicial review where an "informal" action is final and binding on private property owners.[11] *See* Garrity-Rokous, *Preserving Review of Undeclared Programs*, 101 Yale L. J. at 656 ("Administrative agencies' evolution toward increasingly informal decisionmaking processes is legitimate only if the judiciary maintains the oversight role contemplated by the APA.").

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[11] The D.C. Circuit has aptly described the troubling evolution of agency guidance that it characterizes as non-final:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Appalachian Power Co., 208 F.3d at 1020.

The CWA in particular presents unique public policy concerns that necessitate judicial oversight. As *Sackett* noted, "there is no reason to think that the [CWA] was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1367 Recent litigation disputing the EPA's broad assertion of jurisdiction by adopting an almost limitless definition of "waters of the United States" highlights the important role of the courts in limiting agency overreach.[12] *See e.g., In re: Definition of "Waters of the United States,"* 2016 WL 723241, at *1. In addition, the CWA imposes harsh civil and criminal penalties for "'a broad range of ordinary industrial and commercial activities'" and regulated parties spend well over $1.7 billion a year attempting to obtain wetlands permits. *Rapanos*, 547 U.S. at 721 (quoting *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).[13] As Justice Alito observed in his concurrence in *Sackett*, judicial review of agency assertions

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[12] As discussed *supra* and contemplated by the APA's legislative history, the "mere existence" of judicial review operates to discourage the agency from "the arbitrary exercise of powers or assumption of powers not granted." S. Rep. No. 79-752, at 217 (1945).

[13] If wetland permitting was a $1.7 billion per year industry in 2006 when *Rapanos* was decided, the cost is necessarily far greater a decade later.

of jurisdiction under the CWA is necessary because "[a]ny piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the [CWA]. At least [under the majority's decision], property owners like petitioners will have the right to challenge the EPA's jurisdictional determination under the [APA]." 132 S. Ct. at 1375 (Alito, J., concurring).

The combination of the agencies' broad assertion of jurisdiction under the CWA and the draconian penalties imposed for violations of the CWA creates an administrative nightmare for regulated parties who wish to simply use their land. As this Court chillingly foretold in *Rapanos*:

> The[se] enforcement proceedings are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute during the past five Presidential administrations. In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction over "waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States – including half of Alaska and an area the size of California in the lower 48 States. *And that was just the beginning.*

547 U.S. at 722 (emphasis added). This Court has repeatedly been called on to rein in the EPA and the Corps' eager assertions of jurisdiction over private property, no matter how tenuous that property's

connection to jurisdictional waters. *Id.*; *see also Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 167-74 (2001) (rejecting Corps' argument that the CWA's definition of "navigable waters" includes "nonnavigable, isolated, intrastate waters"). As the court below reasoned, in the absence of judicial review, the agencies could prevail on assertions of jurisdiction unsupported by the CWA merely by exhausting the resources and patience of regulated parties:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction – rejected by one of their own commanding officers on administrative appeal – is consistent with the Supreme Court's limiting decision in *Rapanos*.

Pet. App. at 15a. Such dilatory and bad faith tactics are undoubtedly the ills that Congress had in mind when it adopted the APA. Therefore, the APA's presumption of judicial review should be interpreted broadly to protect the rights of regulated parties who have no other recourse at law.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals and hold that a jurisdictional determination constitutes final agency action subject to judicial review under the APA.

Respectfully submitted,

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No. 15-290

In The

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., ET AL.,

Respondents.

On Writ of Certiorari To
The United States Court Of Appeals
For the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF *RESPONDENTS*

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 750 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they construct approximately 80% of all homes in the United States.

NAHB has been involved with litigation concerning whether Clean Water Act jurisdictional determinations are reviewable under the Administrative Procedure Act. In addition, as a representative of land developers, NAHB brings considerable expertise to the issue before the Court.

The National Association of Realtors® ("NAR") is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,300 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

A large part of building and selling homes consists of obtaining and preparing the land for construction[2]. That land often contains "waters of the United States," as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often land developers must alter those "waters" to ensure that their community makes the best use of the land in accordance with local and state zoning and land use requirements.

Unfortunately, property owners cannot simply look at their property to determine the presence and boundaries of "waters of the United States." They must hire consultants (i.e. engineers, scientists, and regulatory and compliance specialists) who assist the developers with the permitting process. Those specialists will often develop a "jurisdictional

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[2] NAHB estimates that the cost of the "finished" lot averages 19 percent of the sales price of a home. Heather Taylor, *Cost of Constructing A Home*, Special Studies (Jan. 2, 2014), http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=221388&channelID=311 (last visited Feb. 16, 2016).

determination" and submit it to the U.S. Corps of Engineers ("Corps") for approval. It is common for the developer's consultants and the Corps to disagree on the Corps's jurisdiction. The extent to which the Corps asserts jurisdiction over a project will directly impact whether and how the development proceeds, and sometimes results in a community not being built.

Furthermore, jurisdictional determinations affect property owners, builders and real estate brokers involved in sales of property that contain jurisdictional waters. The presence of jurisdictional "waters" has a well-recognized impact on the value of property And a number of states require the disclosure of the presence of jurisdictional waters to subsequent buyers. In such states, failure to make the required disclosures can lead to liability for misrepresentation, breach of contract, or even fraud, as well as corresponding liability for damages or other remedies being imposed.

Thus, the Court's decision in this matter will have an appreciable impact on NAHB's and NAR's members.

SUMMARY OF ARGUMENT

The Administrative Procedure Act's ("APA") judicial review provisions must be given a "hospitable" interpretation. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967). Petitioner, however, attempts to constrain APA judicial review. and fails to explain why the Court should disregard Corps regulations and guidance, which clearly show that Clean Water Act ("CWA") "approved jurisdictional determinations" are reviewable under the APA. 33 C.F.R. § 331.2.

Furthermore, when the federal government makes a final determination that it has jurisdiction over property pursuant to the CWA the impact on the property owner extends far beyond the Corps's permitting process. The Petitioner fails to recognize many of the rights impacted, obligations affected, and legal consequences that flow from approved jurisdictional determinations.

ARGUMENT

I. THE APA'S JUDICIAL REVIEW SECTION MUST NOT BE CONSTRAINED.

The Administrative Procedure Act ("APA") provides for judicial review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. The Court has established that an agency action is a "final agency action" if it 1) "mark[s] the consummation of the agency's decision making process," and 2) is an action "by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations omitted).

Congress enacted the APA to address a wide range of agency activities. "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation." Furthermore, "the Court [has] held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967) (internal citations and footnotes omitted) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)); *See also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (providing that "the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention

to preclude review."). "A restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, 'run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes .." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

As evidence of the APA's "generous review provisions" the *Bennett* court specifically used the word "or" within the second prong. "Or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 134 S. Ct. 557, 567 (2013) (internal quotations omitted). Thus, an agency action can satisfy *Bennett's* second prong in any one of three distinct ways. It can determine "rights," it can determine "obligations," or it can be an action from which "legal consequences will flow." Each of these must have "separate meanings." *Id.*

The Petitioner correctly concludes that a jurisdictional determination[3] marks the consummation of its decision making process, thereby satisfying *Bennett's* first prong. Brief for the Petitioner, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, No. 15-290, 2016 WL 322596 (2016) ("Pet'rs Br.") at 25-26. It, however, attempts to limit *Bennett's* second prong, thereby incorrectly

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[3] Unless preceded by "preliminary," when Amici refer to a jurisdictional determination it means an approved jurisdictional determination. *See* 33 C.F.R. § 331.2.

concluding that the APA precludes review of jurisdictional determinations.

Petitioner adds obstacles to *Bennett's* second prong throughout its brief by stating that an action must determine "legal rights," effect "legal obligations" or "impose legal consequences." Pet'rs Br. at 17, 24, 25, 26, 34, 35. These are not the words used in *Bennett*. A legal consequence can flow from an agency action, like a chain of causation, without that action necessarily "imposing" said consequence. Similarly, not all obligations are necessarily "legal" obligations. *Cf. Cincinnati Soap Co. v. United States*, 301 U.S. 308, 314 (1937) (explaining that the United States had a "moral obligation to protect, defend, and provide for the general welfare of, the inhabitants" of the Philippine Islands.); *Roberts v. United States*, 445 U.S. 552, 557-58, (1980) (discussing the "social obligation" to report crime). By improperly adding the limiting words "legal" to "rights" and to "obligations," and "impose" before "legal consequences" the government attempts to "defeat the [APA's] central purpose of providing a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

Accordingly, the Court must reject Petitioner's efforts to restrict judicial review under the APA and should acknowledge that agency action is reviewable unless it is clear that Congress intended otherwise.

II. REGULATIONS, POLICIES, AND COURT DECISIONS ESTABLISH THAT CWA JURISDICTIONAL DETERMINATIONS ARE REVIEWABLE.

The Corps's regulations and policies, combined with Court of Appeals decisions under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. ("RHA"), demonstrate that CWA jurisdictional determinations are reviewable under the APA.

A. The Corps's Regulations and Policies Support Review.

The Corps's own regulation provides that jurisdictional determinations are "Corps final agency action." 33 C.F.R. § 320.1(a)(6). This regulation was adopted in 1986, well after the enactment of the APA. Its purpose was to codify the existing practice of ensuring that when the Corps conducts a jurisdictional determination the "public can rely on that determination." Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206-01 (1986).

Similarly, Corps guidance provides confirmation of the agency's regulatory position. In June 2008, the Corps issued Regulatory Guidance Letter, U.S. Army Corps of Eng'rs (June 26, 2008) No. 08-02[4], on the subject of jurisdictional determinations (hereinafter "RGL 08-02"). In RGL 08-02, the agency

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[4] *Available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf (last visited February 10, 2016).

addresses the differences between "preliminary" jurisdictional determinations and "approved" jurisdictional determinations. The Corps describes preliminary determinations as non-binding, but describes an *approved* jurisdictional determination as "an *official Corps determination* that jurisdictional 'waters of the United States,' or 'navigable waters of the United States,' or both, are either present or absent on a particular site." RGL 08-02 at 1 (emphasis added). The agency's own description of an approved determination is thus a far cry from "additional information that [a] landowner may find useful .," or the "agency's non-binding view." Pet'rs Br. at 16, 18, 41.

Furthermore, RGL 08-02 highlights the rights, obligations, and legal consequences that stem from an approved jurisdictional determination:

> An approved JD:
>
> (1) constitutes the Corps' official, written representation that the JD's findings are correct;
>
> (2) *can be relied upon by a landowner, permit applicant, or other "affected party" (as defined at 33 C.F.R. 331.2) who receives an approved JD for five years* (subject to certain limited exceptions explained in RGL 05-02);
>
> (3) *can be used and relied on by the recipient of the approved JD* (absent extraordinary circumstances, such as

> an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other "affected party," challenging the legitimacy of that JD or its determinations; and
>
> (4) can be immediately appealed through the Corps' administrative appeal process set out at 33 CFR Part 331.

RGL 08-02 at 2 (emphasis added). Legal consequences certainly flow to a landowner that holds a jurisdictional determination when that landowner can rely on it for five years as against the Corps and EPA, and can use it to defend against a CWA citizen suit.

Furthermore, RGL 08-02 demonstrates that jurisdictional determinations obligate the Corps. In *Bennett*, the Court presented the second prong of the final agency action test in the passive voice. *Bennett*, 520 U.S. at 178. Therefore, it is not necessary for the agency action to determine the rights or obligations of the regulated party, nor must it cause legal consequences to flow to the regulated party. The agency action at issue may obligate the action agency or it may cause legal consequence to flow back to the agency

The Court of Appeals for the District of Columbia Circuit has recognized this point. For example, in *General Elec. Co. v. E.P.A.*, 290 F.3d 377 (D.C. Cir.

2002), plaintiffs challenged an EPA guidance document claiming that (among other things) the Agency had not properly promulgated it under the APA. The court explained, "it is clear that the Guidance Document is final agency action because it marks the consummation of the EPA's decisionmaking process and it determines the rights and obligations of both applicants and *the Agency*." *Id.* at 380 (emphasis added).

Similarly, in *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) plaintiffs brought an APA challenge against EPA's "VHS model." Holding that the model was judicially reviewable, the D.C. Circuit explained "If a statement denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations .." *Id.* at 1320.

Therefore, (putting aside the Corps's litigating position), 33 C.F.R. § 320.1(a)(6) combined with RGL 08-02 demonstrate that when the Corps develops a jurisdictional determination the Agency binds *itself* for five years with respect to the precise identification of the limits of jurisdictional waters on a project site. RGL 08-02 at 1. Thus, if a landowner with a jurisdictional determination seeks a permit, the Corps does not revisit that determination. This no doubt "creates rights or obligations." *McLouth*, 838 F.2d at 1320.

B. Rivers and Harbors Act Jurisdictional Determinations are Judicially Reviewable.

Both the Corps's rule which explains that jurisdictional determinations are "final agency action," 33 C.F.R. § 320.1(a)(6), and its definition of "jurisdictional determination," 33 C.F.R. § 331.2, apply equally to the CWA and the Rivers and Harbors Act of 1899, 33. U.S.C. § 401 et seq. ("RHA"). Likewise, RGL 08-02 provides that "[a]pproved jurisdictional determinations (JDs) and preliminary JDs are tools used by the U.S. Army Corps of Engineers (Corps) to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899." RGL 08-02 at 1.

The RHA, similar to the CWA, "requires that a permit be obtained from ... the Army Corps of Engineers, for any activity which takes place in navigable waters of the United States, or which affects the navigable capacity of such waters." *Swanson v. United States*, 789 F.2d 1368, 1371 (9th Cir. 1986)[5]; *see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 179 (2001) (recognizing the similarities between the CWA and RHA). Also similar to the CWA, the jurisdiction of the RHA is limited to "navigable waters of the United States," 33 U.S.C. §§ 401, 407, defined as "those waters that are subject to the ebb

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[5] The Corp's Rivers and Harbors Act regulations require a permit "for structures and/or work in or affecting navigable waters of the United States .." 33 C.F.R. § 322.3 (2015).

and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2015). Thus, as with the CWA, the statutory text of the RHA establishes the limits of the Act, and the Corps developed a regulation interpreting that limit.

In contrast to the CWA, however, many courts have reviewed jurisdictional determinations made pursuant to the RHA. For example, in *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630 (11th Cir. 1995), property owners along Fisheating Creek erected fences, felled trees, and posted "no trespassing" signs to keep the public from using the Creek. Subsequently, the Corps prepared a report, finding that Fisheating Creek was a "navigable water of the United States" under the RHA. Lykes Brothers "brought a civil action pursuant to 5 U.S.C. § 704 against the [Corps] seeking to review and set aside the [agency's] determination that Fisheating Creek ... is a navigable water of the United States .... " *Id.* at 633 (emphasis added). Thus, the Lykes Brothers invoked the APA to obtain judicial review over the Corps's action. The trial court concluded that Fisheating Creek was *not* a "navigable water of the United States." *Lykes Bros., Inc v. U.S. Army Corps of Eng'rs,* 821 F. Supp 1457, 1458 (M.D. Fla. 1993). On appeal, the Eleventh Circuit reviewed the factual findings and found no error in the trial court's decision. Thus, the *merits* of the Corps's RHA jurisdictional determination were tried and appealed – all without raising the question of whether the Corps's jurisdictional determination was final agency action. *See also United States v.*

C.E. Harrell, 926 F.2d 1036 (11th Cir. 1991) (reaching the merits and overturning Corps's determination that Lewis Creek was a navigable water of the United States, even though no permits had been sought to use the waterbody and without any question of whether the agency's action was final).

Similarly, in *Loving v. Alexander*, 548 F Supp 1079 (W.D. Va. 1982), *aff'd*, 745 F.2d 861, 863 (4th Cir. 1984) approximately 67 riparian land owners sought a "judgment declaring that the Jackson River is nonnavigable from the mouth of Dunlap Creek to the base of the Gathright Dam ...." *Id.* The district court upheld the Corps's assertion of RHA jurisdiction, found its "determination of navigability is an agency action," and decided that the "plaintiffs stated a cause of action under the Administrative Procedure Act." On appeal, the Fourth Circuit recognized that "navigability is a term that has traditionally been defined by decisions of the federal courts" and affirmed the district court's decision. *Loving*, 745 F.2d at 864. *See also Leslie Salt Co. v Froehlke*, 578 F.2d 742, 747 (9th Cir. 1978) (reaching the question of Corps's jurisdiction even though the suit "did not involve action or inaction by the Corps on any particular application by [the plaintiff] for a permit under the Rivers and Harbors Act or the [CWA]," because the plaintiff refused to apply for a permit); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 620 (8th Cir. 1979) (Court reviewed the Corps's "Determination of Navigability" developed pursuant to the RHA even though no permit or authorization had been sought.); *Miami Valley Conservancy Dist. v.*

Alexander, 692 F.2d 447, 451 (6th Cir. 1982) (holding that tributaries of Miami River did not fall under the jurisdiction of the RHA in a declaratory judgment case).

Hence, the Courts of Appeals have had little trouble reviewing the Corps's jurisdictional determinations made pursuant to the RHA. The Petitioner, however, offers no justification why jurisdictional determinations made under the CWA should not similarly be subject to APA judicial review.

III. A CWA JURISDICTIONAL DETERMINATION HAS MANY CONSEQUENCES BEYOND THE CORPS'S PERMIT PROCESS.

The Petitioner incorrectly concludes that a CWA jurisdictional determination is just "additional information that the landowner may find useful in choosing between" obtaining a CWA permit, or discharging pollutants without a permit. Pet'rs Br. at 16, 21. That view is not grounded in practical business reality. There are many instances in which a jurisdictional determination affects the rights or obligations of a property owner aside from the section 404 permitting process or agency-initiated enforcement.

A. The Value of Real Property is Impacted by a Jurisdictional Determination.

An essential ingredient in calculating the market value of real property is the "highest and best use" for which the property may be utilized. Without a doubt, the presence of federally designated wetlands

on a parcel of property can constrain its use and considerably impact its value. Donald T. Morrison, *Highest and Best Use of Property Taken Under Eminent Domain,* 19 Am. Jur. Proof of Facts 3d 613 § 5 (West, Westlaw Feb. 2016) (1993). As commented by a land appraisal expert, a "reasonably prudent and knowledgeable buyer would be 'crazy' not to investigate for the presence of jurisdictional wetlands." *Dept. of Transp. v. La Salle Nat'l Bank*, 251 Ill. App.3d 901, 915 (1993). Due to the potentially disastrous financial and legal consequences flowing from a jurisdictional determination, securing an "official Corps determination that jurisdictional waters...are either present or absent on a particular site" has become routine in real property business transactions. RGL 08-02, at 1.

Consider, for example, a small land developer who holds an option contract to purchase unimproved property. As part of a due diligence investigation the developer will want to determine if the property contains CWA "navigable waters." A jurisdictional determination request form is prepared[6] and submitted to the local Corps district office. The Corps responds with an approved jurisdictional determination reporting the presence of several

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[6] The Corp recognizes that requests for jurisdictional determinations may accompany a permit application or be made independent of a permit application, such as where a "landowner [needs] a JD to allow or facilitate the sale of his or her land." Regulatory Guidance Letter, U.S. Army Corps of Eng'rs, (June 5, 2007) No. 07-01, *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-01.pdf at 4 (hereinafter "RGL 07-01").

jurisdictional wetlands along with a map identifying their precise locations.

If the wetlands consume the property line which is coincident with the edge of the public roadway, access to the property may be severely restricted. If the wetlands pock-mark the property the buildable envelope may be reduced or entirely eliminated. The developer must also consider whether permit authorization to alter the wetlands can be secured, the time and expense of securing such authorizations (including avoidance, minimization and mitigation costs) [7], and whether any judgment liens or enforcement actions involving the wetlands encumber the property. Margaret N. Strand, *Wetlands: Avoiding the Swamp Monster*, in *Environmental Aspects of Real Estate Transactions, in* Brownfields to Green Buildings 720, 721 (James B. Witkin 2d ed., 1999); *See* NAHB Land Development Checklist, https://www.nahb.org/en/ research/~/media/887C0A886D0644248ECBAAF501CE18B0.ashx; *See* Randall S. Guttery, Stephen L. Poe & C.F Sirmans, *An Empirical Investigation of Federal Wetlands Regulation and Flood Delineation: Implications for Residential Property Owners*, 26 J. Real Estate Research, No. 3, 303 (2004). Each of these considerations flow from a jurisdictional determination and may profoundly

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[7] *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 – not counting costs of mitigation or design changes").

impact a property's market value. *See* Randall S. Guttery, Stephen L. Poe and C.F. Sirmans, *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners,* 37 Am. Business Law J. 2, 340 (2000) (sale price of residential properties located in areas likely to be delineated as jurisdictional wetlands fell by 10.5 percent, relative to unregulated properties). *See* Katherine A. Kiel, *Environmental Regulations and the Housing Market: A Review of the Literature in* 8 Cityscape: A Journal of Policy Development and Research, No. 1, 195 (2005) (presence of jurisdictional wetlands will decrease the value of land due to uncertainty over whether fill permits will be granted).

Similarly, a lender will always want to assess the value of real property before advancing funds for property acquisition. As an executive for the Maryland Bankers Association remarked on loans secured by unimproved property, "Unless we have a reason to know that it is or isn't a wetland, we just don't know the value of it." William Bunkley and Charles P Edmunds, *Appraising Wetlands*, Appraisal Journal (1992) (quoting John Bowers, Jr. Executive Vice President, Maryland Bankers Association). A jurisdictional determination will be considered alongside any private restrictions, zoning, building codes, historic district controls and other environmental regulations to reach a reasonable market value opinion. In addition, a jurisdictional determination will trigger a marked increase in the amount of site feasibility documentation required by a lender for loan approval. This will directly affect the borrower's

investment and development choices by increasing the length of time required to secure loan approval, the types of outside consultants needed to produce necessary documentation, and the costs associated with both. D. Linda Kone, *Land Development,* 50-51 (Home Builder Press, National Association of Home Builders, 1994).

Perhaps the most telling examples of rights being determined and legal consequences flowing from a jurisdictional determination arise in the context of land condemnation proceedings. The just compensation constitutionally required in condemnation cases is the fair cash market value of the condemned property when put to its highest and best use. *U.S. v. Twin City Power Co.*, 350 U.S. 222, 235-236 (1956); *U.S. ex rel. and for Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 275-276 (1943); 4 Julius L. Sackman, *Nichol's The Law of Eminent Domain* (Rev. 3d ed. 1990) § 12 B.12, pp. 89-133. When determining market value it is proper to consider all physical, legal and government restrictions delimiting the availability of property for a proposed use. This calculus necessarily includes the presence of regulable wetlands, as identified through a Corps jurisdictional determination.

In *Normandy Corp. v. S.C. Dept. of Transp.*, 386 S.C. 393, 688 S.E. 2d 136 (S.C. Ct. App. 2009), *cert. denied* (Mar. 2, 2011), the South Carolina Department of Transportation ("DOT") brought a condemnation action to acquire six acres of private property for the construction of a parkway. The DOT argued that just compensation for the property

should be calculated using a 1997 jurisdictional determination representing the Corps' "final word" that 50% to 75% of the property was comprised of jurisdictional wetlands. *Normandy Corp.* 399-400, 406-407 The property owner countered that DOT's appraisal severely undervalued its condemned parcel because the jurisdictional determination predated the condemnation date by three years. The state appeals court agreed with the property owner. It found that "because the amount of jurisdictional wetlands existing on a tract of land has a significant impact on the value of that tract, evidence regarding jurisdictional wetland amounts [as of the condemnation date] is relevant and material to fixing just compensation." *Normandy Corp.* at 407 Thus, legal consequences clearly emanate from the issuance of a jurisdictional determination.

Similarly, *U.S.A. v. 48.86 Acres of Land, More or Less*, 2001 WL 474410 (E.D. Pa. April 30, 2001) involved a 1989 condemnation action concerning the valuation of the landowner's property. To establish current market value the landowner's expert certified that the "highest and best use" of the property was commercial development. The United States challenged the landowner's appraisal evidence as flawed for failure to analyze the impact of Corps designated jurisdictional wetlands on such development plans, contending that the presence of jurisdictional wetlands will have "a major impact on the value of the property." *Id.* at 2. The district court agreed with the United States. Based on the legal relevance of a jurisdictional determination, the court issued an Order authorizing federal entry onto

Defendants' land to conduct a determination. *48.86 Acres of Land*[8]; *See also Dept. of Transp. v. LaSalle Nat'l Bank*, 251 Ill.App.3d 901 (1993) (illustrating how a Corps jurisdictional determination is used by courts in determining the value of real property).

Thus, in *48.86 Acres of Land*, the government recognized the impact of a jurisdictional determination on the value of real property, while here it claims it is just an informational tool. Pet'rs Br. at 16. The government cannot have it both ways.

B. Some States Require Real Property Owners to Disclose The Presence of Wetlands to Buyers.

Recognizing the potentially devastating impact jurisdictional wetlands may have on real property values, a number of state now impose strict wetland disclosure obligations on sellers of residential real property. Failure to disclose the presence of wetlands, as identified through a jurisdictional

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[8] This case also illustrates that landowners do not always request jurisdictional determinations. While in *U.S.A. v. 48.86 Acres of Land* the court ordered the determination, in some cases the Corps will conduct the jurisdictional determination on its own. *See* Brief of *Amicus Curiae* the National Association of Home Builders in Support of Petitioner, *United States Army Corps of Eng'rs v. Hawkes Co., Inc*, No. 15-290 (filed Oct. 6, 2015) (explaining that in Arizona the Corps issued a jurisdictional determination on its own that affected thousands of square miles of property, did not notify any of the affect property owners, and still claimed that the determination was not an APA final agency action.)

determination; can carry significant legal consequences.

For example, in the state of Louisiana, all known real property defects must be disclosed prior to a sale. LA R.S. 9:3195-3199. The Louisiana Real Estate Commission, a state government regulatory agency, has identified defects that may have a "substantial adverse affect on the value of property" and produced them in the Louisiana Residential Property Disclosure form. LA R.S. 9:3198(A)(1); Informational Statement for Louisiana Residential Property Disclosure Form[9], revised Feb. 1, 2015. The mandatory form requires seller to disclose whether "any part of the property [has] been determined a wetland by the United States Army Corps of Engineers under § 404 of the Clean Water Act," to attach a copy of the jurisdictional determination, and to provide notice that additional costs for a § 404 permit may result. Property Disclosure Document for Residential Real Property, revised Feb. 1, 2015. App. 1a.

Historically, New York state home sellers had no duty to disclose the presence of property defects prior to a transfer. In 2002, the state legislature created exceptions to the general rule of "caveat emptor" through passage of the Property Condition Disclosure Act. NY Real Prop. Law §§ 460-467 The Act requires every seller of residential real property complete a property condition disclosure statement,

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[9] *Available at* http://www.lrec.state.la.us/pdf_files/forms/Residential-Property-Disclosure-Legal.pdf (last visited 02.29.16)

or pay a credit of $500 to the purchaser at closing. *Id.* at §462. One of the questions on the disclosure statement is whether any part of the property contains a "designated wetland." If so, the seller must provide details about the wetland to the buyer. NYS Dept. of State Division of Licensing and Services (Rev. 8/06), *available at* https://www.dos.ny.gov/forms/licensing/1614-a.pdf at 2.

In Hawaii, the seller is required to provide a purchaser with a disclosure statement that fully and accurately exposes all known or reasonably discoverable "material fact[s]" relating to the property. Haw. Rev. Stat. Ann. § 508D-1. "Material fact[s]" are defined as "any fact, defect, or condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential property being offered for sale." *Id.* Because a Corps wetland determination measurably impacts the value of property, such determination would need to be disclosed to all prospective purchasers. *See also*, R.I. Gen. Laws § 5-20.8-2(a) & (b)(2)(xxviii) (requiring disclosure of all "material facts" regarding the property, including the location of coastal wetlands, fresh water wetlands, marshes or swamps that many impact future development). The seller of residential real property in Oregon faces a similar duty to disclose "any governmental studies, designations, zoning overlays, surveys or notices that would affect the property." Or. Rev. Stat. § 105.464. Finally, the Wisconsin Code includes a report form entitled Real Estate Condition Report Disclaimer. Wis. Stat. § 709.03.

Part C.11 of the report requires disclosure of all "floodplain, wetland or shoreland zoning area[s]. *Id.*

While the above described wetland disclosure obligations will place the prospective purchaser in a more informed position regarding pitfalls associated with the property, they also have the effect of commanding the property owner to affirmatively disclose the presence of regulated wetlands. Failure to do so may trigger legal consequences sounding in breach of contract, fraudulent concealment, and negligent misrepresentation.

C. Housing Grant and Assistance Programs are Affected by Jurisdictional Determinations.

The U.S. Department of Housing and Urban Development ("HUD") administers a number of housing grant and financial assistance programs that involve Amici's members. HUD's programs are designed to provide states, municipalities, and communities with the resources they need to provide housing and community development projects that benefit low-income individuals and at-risk communities.

Projects receiving HUD financial assistance must undergo an environmental review process, which varies depending on the scope and circumstances of the project[10] However, for all projects involving new construction or the expansion of an existing building

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[10] *Available at* www.hudexchange.info/programs/environmental-review/ (last visited March 1, 2016)

footprint, HUD or its grantees must determine whether there are wetlands on the project site, or if there are off-site wetlands that may be impacted by the development of the site[11] HUD's regulations provide that "wetlands" include (among others) wetlands "subject to section 404 of the Clean Water Act," 24 C.F.R. § 55.2(b)(11), and require project proponents to avoid impacts to wetlands. 24 C.F.R §§ 55.1(a)(2), 55.11(b).

Thus, if a developer receiving HUD financial assistance holds an approved jurisdictional determination that indicates wetlands on the property, and i) plans to take an action in the wetland that does not require a Corps permit, or ii) plans to obtain a Corps general permit, HUD's regulations mandate that the landowner complete an 8-step process to determine that there are no practicable alternatives to wetlands development. 24 C.F.R. § 55.20. This 8-step process requires the proponent to publish public notices and accept public comment; identify and evaluate practicable alternatives to the proposed site; and identify and evaluate potential direct and indirect impacts to wetlands and means, such as compensatory mitigation, that restore or preserve a wetland's natural beneficial functions. At the end of the process, the proponent must re-evaluate the proposed project in light of the information gleaned through the above-described process, and determine whether no practicable alternative to impacting a

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[11] *Available at* www.hudexchange.info/programs/environmental-review/wetlands-protection/ (last visited March 1, 2016)

wetland exists. If the agency determines that there are no practicable alternatives, it may pursue the original project only after another public notice and opportunity for public comment is published. *Id.*

HUD's wetlands protection requirements apply, regardless of whether the proponent ultimately obtains a permit to fill the on-site wetlands. Thus, compliance with HUD's 8-step regulatory process flows from the presence of an approved jurisdictional determination.

D. The Recipient of a Jurisdictional Determination is Subject to Additional Penalties.

Petitioner repeatedly claims that the recipient of an approved Corps jurisdictional determination is not exposed to additional penalties if a CWA violation is later identified. *See* Pet'rs Br. at 10, 16-17, 20, 22-23, 24, 26, 29-32. In support of that position Petitioner attempts to blur the distinction between preliminary jurisdictional determinations, written indications that there "may be" jurisdictional waters and which are "advisory in nature," and approved jurisdictional determinations, a definitive, official determination that there *are*, or that there *are not*, jurisdictional waters on a site. 33 C.F.R. § 331.2; RGL 08-02, 1, 3 (emphasis added). Petitioner labels an approved jurisdictional determination an innocuous information tool not dissimilar from informal agency guidance or opinion letters. Pet'rs Br. at 16-17, 33. In reality, an approved jurisdictional determination carries the legal effect necessary for final agency action because it affects

federal administrative and judicial enforcement actions and the extent of penalties available.

1. Jurisdictional Determinations Impact the Amount of Civil Penalties Courts Consider.

Section 309(b) of the CWA authorizes the Administrator to initiate civil actions in federal court seeking injunctive relief as well as civil penalties[12]. 33 U.S.C. 1319(b). Section 309(d) of the CWA provides that "[i]n determining the amount of a civil penalty the court shall consider" the following six factors: "*the seriousness of the violation or violations*, the economic benefit (if any) resulting from the violation, any history of such violations, any *good-faith efforts to comply* with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d) [13] (emphasis added).

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[12] The maximum penalty for civil violations occurring after Dec. 6, 2013, is $37,500 per day for each violation. 33 U.S.C § 1319(d); 40 C.F.R. § 19.4 (2013).

[13] When a federal judicial enforcement action seeking civil penalties is filed, the United States' general practice is not to request a specific proposed penalty. Rather, a request for penalties "up to" the CWA statutory maximum is typically recited. Memorandum from Sylvia Lowrance, Acting Asst. Adm'r, EPA OECA, to Waters Prot./Mgmt. Div. of Dir. et al., Issuance of Revised CWA Section 404 Settlement Penalty Policy (Dec. 21, 2001) at 7, *available at* http:// www.epa.gov/ sites/production/files/documents/404pen.pdf. (last visited March 1, 2016)

If Hawkes had disobeyed the findings of the Corps's Dec. 31, 2012 revised approved jurisdictional determination, Pet'rs App. 44a-102a (hereinafter "Dec. 31 Jurisdictional Determination"), and commenced peat mining without the necessary CWA permits a reviewing court would certainly take into consideration the information detailed in the Dec. 31 Jurisdictional Determination before calculating a penalty. The extent of wetlands and their "exceptional quality" would speak to the seriousness of the violation. Pet'rs App. 64a; *see Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F Supp. 1368, 1383 (D. Haw. 1993) (looking at the significance of the CWA violation and the actual or potential harm to human health and the environment when assessing a civil penalty); *United States v. Avatar Holdings, Inc.*, No. 93-281-CIV-FTM-21, 1996 WL 479533, at 6 (M.D. Fla. Aug. 20, 1996) (finding the seriousness of a violation is determined by considering "the number, duration and degree of the violations as well as the actual or potential harm to human health and the environment"); *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp.2d 41, 49-50 (N.D. N.Y. 2003) (noting that courts should consider the severity of the violations and their effect on the environment when calculating penalties under the CWA).

Likewise, Hawkes's good-faith efforts to comply with the law would be brought into question because Hawkes received not one, but three jurisdictional

determinations[14] Each of those jurisdictional determinations reported, albeit under different theories, that "There are 'waters of the U.S.' within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area." *See e.g.* Dec. 31 Jurisdictional Determination at App. 50a. Evidence of good-faith efforts would include whether the defendant should have known that its conduct might be prohibited and whether the findings of the jurisdictional determination were ignored.

In *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1991), *cert. denied*, 531 U.S. 813, 121 (2000), the court refused to find any good-faith efforts at CWA compliance because the defendants demonstrated little urgency to meet the terms of their existing permit and their discharge violations actually increased over time. *Id.* at 531. The court was also unimpressed with defendants' claim of good-faith by reason of their engagement of compliance consultants. It explained that if a defendant seeks a consultant's expert advice but ignores the advice and fails to implement suggestions, then the defendant has not shown good-faith. *Id.*; *See United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 350-351 (1997). Likewise, if a defendant requests a Corps jurisdictional determination, and later ignores the official findings of that determination, good-faith as an aggravating

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[14] Nov. 8, 2011, U.S. Army Corps of Eng'rs Draft Jurisdictional Determination; Feb.7, 2012 U.S. Army Corps of Eng'rs Approved Jurisdictional Determination at App. 4a; Dec. 31 Jurisdictional Determination at App. 44a.

rather than mitigating factor will be used in fashioning a civil penalty.

2. Jurisdictional Determinations Impact the Amount of Administrative Penalties the Agencies Assess.

The large majority of Corps and EPA CWA enforcement actions are brought through civil administrative orders, which command corrective action by a date certain and often impose penalties. 33 U.S.C. § 1319(a) [15]. The agencies must assess administrative penalties after taking into account the factors identified in CWA section 309(g). The factors are: "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the *degree of culpability*, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3) (emphasis added). EPA has incorporated and elaborated on these factors in its "404 Settlement Penalty Policy," (hereinafter, "Penalty Policy") which it uses to calculate appropriate administrative penalties. Memorandum from Sylvia Lowrance, Acting Asst. Adm'r, EPA OECA, to Waters Prot./Mgmt. Div of Dir. et al., Issuance of Revised CWA Section 404

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[15] The CWA prescribes two classes of administrative penalties: Class I for less egregious conduct, which cannot exceed $16,000 per violation or $37,500 in total; and Class II for serious conduct, which are assessed at an amount not to exceed $16,000 per violation but which can be as high as $187,500 in total amount. 33 USC § 1319(g); 40 C.F.R. § 19.4 (2013).

Settlement Penalty Policy (Dec. 21, 2001), *available at* http:// www.epa.gov/sites/production/files/documents/404pen.pdf

When the government's case development "Team"[16] analyzes the "degree of culpability" the "principal criteria" are "*previous experience with or knowledge of the Section 404 regulatory requirements*, the degree of the violator's control over the illegal conduct, and the violator's motivation..." *Id.* at 13 (emphasis added). When assessing the violator's previous experience or knowledge the Team will look to whether "the violator knew or should have known of the need to obtain a Section 404 permit or of the adverse environmental consequences of the discharge prior to proceeding with the discharge activity." *Id.* The Team will assign a gravity value at the high end of the spectrum if there was "previous receipt of a Section 404 authorization or a prior independent opinion of the need for a permit." *Id.*

After calculating the preliminary gravity amount, the Team may adjust the amount up or down based on factors including: (1) recalcitrance (bad-faith); (2) cooperation; (3) inability to pay; (4) litigation consideration; and (5) other case-specific factors. *Id.* at 15-17

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[16] The case development team refers to the Agency 404 technical and legal staff responsible for developing and pursuing a particular administrative or judicial enforcement action.

The Dec. 31 Jurisdictional Determination reported to Hawkes that "there are 'waters of the U.S.' within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area." Pet'rs App. 50a. That same jurisdictional determination reported the presence of a jurisdictional wetland complex of "high vegetative biodiversity... [with] pre-European settlement conditions and ... outstanding statewide biodiversity significance ranking...represent[ing] one of the best examples of ridge and swale communities in Marshall County and northwestern Minnesota...[with a] full suite of functions...include[ing]: vegetative diversity/ integrity, maintenance or characteristic hydrology, flood attenuation, downstream water quality. characteristic wildlife habitat structure, and maintenance of characteristic amphibian habitat." Dec. 31 Jurisdictional Determination at Pet'rs App. 64a -65a.

Thus, by virtue of the Dec. 31 Jurisdictional Determination, Hawkes knew that waters of the United States were present on the property, that 404 permit requirements applied, and that the biological value of the site was significant. Furthermore, Petitioner admits "[a] landowner's receipt of a jurisdictional determination – and its consequent knowledge that the agency believes the CWA applies – could be offered as evidence of the owner's knowledge of the CWA's applicability" Pet'rs Br. at 32.

Yet, Petitioner claims that Hawkes would not expose itself to increased judicial or administrative penalties if, with all of this knowledge, it thumbed

its nose at the Corps and willfully destroyed the high value wetlands on the site. Pet'rs Br. at 17

Petitioner's claim is implausible and the facts illustrate the legal consequences that flow from jurisdictional determinations.

E. Jurisdictional Determinations Control Where Landowners Have a Right to Proceed.

Finally, consider a development project that contains "waters of the United States." 33 CFR § 328.3(a). However, consider it from the position of the upland instead of from the jurisdictional water. When the Corps conducts a jurisdictional determination it does not simply determine if the property does or does not contain "waters of the United States." It "precisely identifies the limits of those waters on the project site determined to be jurisdictional .." RGL 08-02, at 1. Thus, the Corps literally stakes the bounds of the jurisdictional waters. Within those bounds, the landowner may not add a pollutant without either a Corps or EPA permit[17]

Outside the bounds of the jurisdictional determination, however, the property owner has (with respect to the CWA) the *right* to use the property how he or she sees fit. *See United States v.*

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[17] If the pollutant is "dredge or fill material" then the landowner obtains a permit from the Corps under 33 U.S.C. § 1344. If the pollutant is not dredge or fill material, then EPA must issue a permit under 33 U.S.C. § 1342.

Craft, 535 U.S. 274, 279 (2002) (explaining that each of the three types of concurrent ownership provides the owner with the right to use the property); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945)"). In other words, a jurisdictional determination does not only explain where the CWA applies, it explains precisely where it does not apply.

This illustrates the error with the Petitioners' assertion that a person who believes there exist "waters of the United States" on his or her property may either seek a permit, or alternatively proceed without a permit if "it believes that the relevant site does not contain 'waters of the United States.'" Pet'rs Br. at 21. There exists a third option where many of Amici's members fall. These members believe there are some "waters of the United States" on their property and they want to proceed by avoiding those areas. Thus, they need to know where the CWA does not apply so that they can proceed in those areas without a permit—which they have a right to do[18]. Clearly, for these landowners jurisdictional determinations affect their rights.

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[18] Additionally, it is also not an "adequate remedy" to force these landowners to obtain a permit that they do not desire just so they can obtain judicial review. *See* 5 U.S.C. § 704.

CONCLUSION

The Petitioner attempts to constrain APA judicial review, and fails to adequately address its regulations and guidance documents, which both recognize that approved jurisdictional determinations satisfy the final agency action test the Court established in *Bennett*. Furthermore, the Petitioner views approved jurisdictional determinations myopically by not considering all of the rights impacted, obligations affected, and legal consequences that flow from approved jurisdictional determinations. For these reasons, the Court must affirm the decision below and hold that approved jurisdictional determinations are subject to APA judicial review.

DATED: March 2, 2016

Respectfully submitted,

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APPENDIX A
1a
PROPERTY DISCLOSURE DOCUMENT FOR RESIDENTIAL REAL ESTATE

Answer all questions to the best of your knowledge. Explain any "yes" answers fully at the end of each section.

Y = Yes N = No NK = No Knowledge

SECTION 1: LAND

(1) Lot size or acres _____

(2) Are there any servitudes/encroachments regarding the property, other than typical/customary utility servitudes, that would affect the use of the property? ☐ Y ☐ N ☐ NK

(3) Are there any rights vested in others? Check all that apply and explain at the end of this section.

Timber rights	☐ Y	☐ N	☐ NK
Common driveway	☐ Y	☐ N	☐ NK
Right of ingress or egress	☐ Y	☐ N	☐ NK
Mineral rights	☐ Y	☐ N	☐ NK
Right of way	☐ Y	☐ N	☐ NK
Surface rights	☐ Y	☐ N	☐ NK
Right of access	☐ Y	☐ N	☐ NK
Air rights	☐ Y	☐ N	☐ NK
Servitude of passage	☐ Y	☐ N	☐ NK
Usufruct	☐ Y	☐ N	☐ NK
Servitude of drainage	☐ Y	☐ N	☐ NK
Other _____	☐ Y	☐ N	☐ NK

(4) Has any part of the property been determined a wetland by the United States Army Corps of Engineers under §404 of the Clean Water Act?

☐ Y ☐ N ☐ NK

(a) Is such a determination pending?

☐ Y ☐ N ☐ NK

(b) What date was determination made? _____

The Clean Water Act is a federal law that protects the wetlands of the United States. Section 404 of the Act contains permit requirements for altering or building on property that has been determined a wetland by the Army Corps of Engineers. The Corps may assess a fee to the **SELLER** or **PURCHASER** of a property for this determination. A property that has been determined a wetland may result in additional costs for a Section 404 permit. Documentation is attached and becomes a part of this property disclosure if the property described herein has been determined a wetland by the Corps.

(5) Has any flooding, water intrusion, accumulation, or drainage problem been experienced with respect to the land? If yes, indicate the nature and frequency of the defect at the end of this section.

☐ Y ☐ N ☐ NK

(6) What is/are the flood zone classification(s) of the property? _____

(a) What is the source and date of this information?
Check all that apply. ☐ Survey/Date _____
☐ Flood Elevation
☐ Certificate/Date _____
☐ Other/Date _____

Question Number	Explanation of "Yes" answers
_____	_____
_____	_____
_____	_____

☐ Additional sheet is attached

SECTION 2: TERMITS, WOOD-DESTROYING INSECTS AND ORGANISMS

(7) Has the property ever had termites or other wood-destroying insects or organisms?
☐ Y ☐ N ☐ NK

(8) Was there any damage to the property?
☐ Y ☐ N ☐ NK

(9) Was the damage repaired?
☐ Y ☐ N ☐ NK

(10) Is the property currently under a termite contract? ☐ Y ☐ N ☐ NK

(a) Name of company _____

(b) Date contract expires _____

(c) List any structures not covered by contract _____

* * *

APPENDIX B

4a

DEPARTMENT OF THE ARMY

St. Paul District, Corps of Engineers
180 Fifth Street East, Suite 700
St. Paul MN 55101-1678

Reply to attention of
Operations Regulatory
(2007-1914-DJS)

FEB 07 2012

Mr. Kevin Pierce
Hawkes Peat Company, Inc.
P.O. Box 14111
Grand Forks, North Dakota 58208

Dear Mr. Pierce:

This is in response to your request that the Corps of Engineers provide an Approved Jurisdictional Determination on the 520- acre property (Mercil Site), now owned by Hawkes Peat Company, Inc. The project site is located in Sec. 13, T. 157N., R. 44W., Marshall County, Minnesota.

This letter contains an approved jurisdictional determination for your subject site. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR Part 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal this determination, you must submit a completed RFA form to the Mississippi Valley Division Office at the following address:

Administrative Appeals Review Officer
Mississippi Valley Division
P.O. Box 80 (1400 Walnut Street)
Vicksburg, MS 39181-0080
(601) 634-5821
(601) 634-5816 (fax)

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP Should you decide to submit an RFA form, it must be received at the above address by

It is not necessary to submit an RFA form to the division office if you do not object to the determination in this letter

Please be aware that this determination **does not** specifically identify the limits of our jurisdiction on the Mercil Site. The attached Approved Jurisdictional Determination confirms that there are wetlands present and that they are waters of the U.S. and are subject to our jurisdiction under section 404 of the Clean Water Act (CWA). In this case, the limits of Federal jurisdiction would be established with a wetland delineation. As you are aware, my staff has

EXHIBIT
6

* * *

No. 15-290

In The
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENTS

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Dated: March 2, 2016

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QUESTION PRESENTED:

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedures Act?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief *amicus curiae* in support of Respondents, Hawkes Co. Inc. et al. The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 325,000 members businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is reflection of American small business.

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[1] Counsels of record have both filed blanket consents to amicus filings in this case. In accordance with Rule 37.6, NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Legal Center files in this case because small business property owners have a great interest in preserving and protecting their property rights in the face of aggressive—and potentially erroneous—assertions of federal jurisdiction under the Clean Water Act (CWA). Of special concern here, small business property owners typically have limited financial resources and cannot afford the exorbitant costs of pursuing a Section 404 permit application where those costs are imposed as an effective condition for obtaining judicial review of an errant jurisdictional determination.

SUMMARY OF ARGUMENT

The Petitioner, Army Corps of Engineers (Corps), and the Environmental Protection Agency (EPA) enforce the Clean Water Act (CWA) with the threat of shock-and-awe penalties and criminal prosecution. But, unlike most federal regulatory regimes, the scope of the CWA's prohibition is vague at best. While the Act is clear in prohibiting unpermitted dredging or filling activities within areas deemed jurisdictional, it is anything but clear in spelling out jurisdiction.

The uncertain reach of the CWA, in turn, has a coercive chilling effect. In light of the ruinous penalties that EPA and the Corps threaten for even negligent violations, prudent counsel would advise against developing any portion of land that is even arguably jurisdictional without first obtaining a

negative Jurisdictional Determination (JD) from the Corps. That is the only safe way to proceed with development plans because a final JD is binding on the agency and civil litigants for a period of five years. The only other option—for an owner wishing to make use of the land—is to obtain a Section 404 permit from the Corps at great cost.

But if the owner has gone through the trouble of obtaining an expert opinion that the property is *non-jurisdictional*, it would be absurd to expect the owner to apply for a Section 404 permit that may be unnecessary. This is especially true given that the permitting process is exorbitantly expensive—often costing hundreds-of-thousands of dollars. Given those severe costs, most small business landowners are forced to abandon their plans for any portion of their property that might be considered jurisdictional—which means the property is treated as if it were effectively subject to a federal conservation easement. Simply put, the regime is cost-prohibitive for all but major corporations.

Nonetheless the Corps insists that landowners must submit to the CWA's burdensome permitting process even in cases where the agency may potentially lack jurisdiction. Yet, once the Corps determines, with the issuance of an approved JD, that a property is subject to CWA regulation, the owner should have an immediate right to contest that assertion of jurisdiction. To be sure, it is the exclusive role of the judicial branch—not the executive—to determine the rights and obligations of individuals. Any contrary rule would result in due process violations, which is why the Administrative

Procedures Act authorizes judicial review whenever a final agency action purports to speak to an individual's rights or obligations under federal law.

And there can be no question, in this case, that the JD determined Respondent's rights and obligations under the CWA. With issuance of an affirmative JD, the Corps effectively asserted an environmental easement over the land—demarcating what portions the owner was forbidden from using without the Corps' express approval. But if the Corps has wrongfully asserted jurisdiction, then this effective restriction on use was imposed without due process of law. Thus judicial review is required under the APA, and is fundamentally necessary in order to avoid a potential constitutional violation.

ARGUMENT

I. The Agency Would Require Landowners to Either Submit to a Prohibitively Expensive and Potentially Unnecessary Permitting Regime, or Risk a Ruinous Enforcement Action

A. Judicial Review is Necessary to Keep the Agency From Overstepping its Authority

The jurisdictional "reach of the Clean Water Act [CWA] is notoriously unclear." *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1375 (2012) (observing that "[a]ny piece of land that is wet at least part of the year is in danger of being

classified ... as wetlands covered by the Act...").[2] On three occasions this Court has attempted to clarify the CWA's reach, but has been unable to agree upon a single test for determining the scope of CWA jurisdiction. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Bayview Homes*, 474 U.S. 121 (1985).[3] In *Rapanos*, a plurality would have held that, in order to assert jurisdiction, the agencies must establish a "continuous surface connection" between the property in question and traditionally

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[2] Some scholars have suggested that the CWA's jurisdictional provisions are so vague that they fail to provide constitutionally adequate notice to some affected landowners. *See* Jonathan H. Adler, Wetlands, *Property Rights, and the Due Process Deficit in Environmental Law*, Cato Sup. Ct. Rev., 2011-2012, 139, 161-62 (2012) (arguing that "'[M]en of common intelligence' lack notice that federal regulation of ... [waters of the United States] may reach private lots in the middle of residential subdivisions that are completely dry much, if not most, of the year and lack any discernible nexus to navigable waters. ... [E]ven well-informed landowner[s] could be unclear as to how far federal regulatory jurisdiction extends.").

[3] NFIB is among the numerous organizations and states challenging the legality of the recently promulgated "Waters of the United States" (WOTUS) Rule, through which EPA and the Corp now seek a radical expansion of CWA jurisdiction. 80 Fed. Reg. 37,054 (June 29, 2015). Accordingly, this Court may soon be called upon—once again—to decide whether these agencies are overreaching, and related questions. *Compare N. Dakota v. U.S. E.P.A.*, No. 3:15-CV-59, 2015 WL 5060744, at *1 (D.N.D. Aug. 27, 2015) (holding original jurisdiction to challenge the WOTUS Rule rests in the district courts); *with In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, No. 15-3839, 2016 WL 723241, at *114 (6th Cir., Feb. 22, 2016) (holding the Sixth Circuit has exclusive jurisdiction to hear challenges to the WOTUS Rule).

navigable interstate waters. *Rapanos*, 547 U.S. 715 (2006). By contrast, Justice Kennedy's significant nexus test would require a more complicated assessment of the "chemical, biological and hydrological connection between the property *and* other regulated waters." *Id.* at 779-80 (J. Kennedy concurring) (emphasis added).

Under both tests the burden of proof rests on the agency asserting jurisdiction. *Id.* at 780-82 (emphasizing that the agency must assess jurisdiction "on a case-by-case basis," and must demonstrate the requisite connection to navigable waters). Nonetheless, as a practical matter, once an agency definitively asserts that a property contains jurisdictional waters, it has effectively shifted the onus to the landowner to go to court if he or she disagrees. That would not be a problem if it were simply a matter of filing a complaint, as the agency would then have to justify its assertion of jurisdiction—based on facts in the record—in a court of law. And, facing the prospect of judicial review, the agency would therein have an incentive to make good faith assessments of jurisdiction. But the Corps' maintains that it should be insulated from judicial review.

The Corps holds out the possibility that a landowner might eventually be allowed to contest its jurisdiction in court—but only if the owner first pursues a Section 404 permit. The agency knows that this will effectively prevent the vast majority of landowners from contesting its assertion of jurisdiction—regardless of how egregiously wrong it may be in claiming regulatory authority over any

given property. This is because the Corps will not process a Section 404 permit application until it is deemed complete, and the process for completing such an application is exorbitantly difficult and expensive. *See Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 460 (Fed. Cir. 2009) (explaining that federal regulations require the Corps to commence with public notice and review "within 15 days of days of the submission of a 404 permit application, but only if the application is [deemed] complete[,]" and noting an inexplicable 18 month delay during which time the Corps maintained a permit application was incomplete.) (citing 33 C.F.R. § 325.2). As such, the Corps "exercises the discretion of an enlightened despot," *Rapanos*, 547 U.S. at 720, knowing that it will not likely be held to account for a wrongful assertion of jurisdiction because—realistically—landowners of modest means cannot afford to jump these regulatory hurdles, much less litigate a case against the federal government after expending thousands of dollars on a potentially unnecessary permitting process.

B. A Wrongful Assertion of Jurisdiction Causes an Immediate Constitutional Injury

i. A Jurisdictional Determination Necessarily 'Determines' the Landowners' Rights and Obligations

The Corps contends that an affirmative jurisdictional assessment is of no legal consequence

because it merely clarifies the reach of the CWA. Pet. Opening Br. at 27. But even assuming that the agency is correct in its delineation of CWA jurisdiction, with regard to the property in question, it is sheer fantasy say that it has not therein "determined" the owner's "right or obligations." *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that a final agency action may be challenged if "'rights or obligations have been determined,' *or* [if it is an action] from which 'legal consequences will flow[.]") (citing *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)) (emphasis added). For one, in definitively determining the scope of CWA jurisdiction, the agency has made clear what portion of the property the landowner is foreclosed from using in the absence of a federally issued permit. Pet. Opening Br. at 28-30 (acknowledging that the Corps will not revisit a final JD, except on the basis of new information). Conversely this delineation necessarily determines what portions of land the owner may safely develop without obtaining a permit.[4] *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter, No. 08-02 (June 26, 2008) (providing that an approved JD "can be relied upon ... for five years."). Moreover, in many cases, once a jurisdictional assessment is made, that determination automatically triggers additional restrictions under state law, further limiting permissible uses of the land. *See e.g., Barnum Timber Co. v. Environmental*

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[4] Given how difficult it is for an ordinary person to understand the geographical reach of the CWA, most landowners will—as a practical matter—rely on the Corps' assessment. The Corps acknowledges that few landowners even seek to appeal an initial jurisdictional assessment within the agency. Pet. Opening Br. at 5-6.

Protection Agency, 633 F.3d 894 (9th Cir. 2013) (holding that a landowner had standing to challenge EPA action under the CWA because it triggered restrictions under California law, which resulted in devaluation of the property's value).

Yet, even if the owner should disagree with the Corps' conclusion that the land contains jurisdictional waters, the owner is practically bound. No reasonable person would proceed with development plans within an area deemed jurisdictional by the Corps without either (a) obtaining a judicial decision making clear that the property is non-jurisdictional, or (b) obtaining a federal permit to proceed. Any competent attorney would emphatically counsel against ignoring an affirmative JD because—once the Corps has made known its position that the property contains jurisdictional waters—a violation would no longer be deemed negligent.

At that point an unpermitted discharge would be deemed a "knowing violation," which would almost assuredly mean heavier civil penalties, if not criminal liability. 33 U.S.C. § 1319 (authorizing penalties of up to $50,000 per day, and imprisonment for up to three years, for knowing violations). And it can be no answer that EPA and the Corps might choose—in their benevolent discretion—to show restraint because they are statutorily bound to enforce the CWA. 33 U.S.C. § 1319(a)(3) (providing that when EPA "finds that any person is in violation" of the CWA, the agency "shall issue an order requiring such person to comply with [the Act] [and typically ordering the owner to

pay for environmental remediation], or ... shall bring a civil action [to enforce the Act]."). To be sure, the EPA made a similar argument in *Sackett*, suggesting it only rarely seeks the statutory maximum when bringing a civil action, to which Justice Scalia quipped: "I'm not going to bet my house on that." Transcript of Oral Argument at 30-31, *Sackett*, 132 S. Ct. 1367 (No. 10-1062).

ii. Without Opportunity for Pre-Enforcement Judicial Review, a Landowner's Only Choice is to Abandon Development Plans or to Pursue a Costly Permit

In this case, as in *Sackett*, the property owner maintains that the agency has wrongfully asserted jurisdiction. If that is true, then the agency utterly lacks any basis in the law to regulate the subject property at all.[5] *See* Bernard H. Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 16-17 (2001) (explaining due process requires that a deprivation of property rights be founded in "legitimately enacted law."). But by virtue of the Corps' affirmative JD the owner is understandably afraid to proceed with development plans because the agency has implicitly threatened an enforcement action if he or she should disregard the Corps' determination. As in *Sackett*, the agency means to "scare the owners into compliance—regardless of whether their

[5] Moreover, the facts alleged in a complaint must be presumed true at this stage of litigation. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

property [is] [or is not] a jurisdictional wetland..." Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 123 (2012).

In *Sackett*, this Court unequivocally rejected the suggestion that an individual should have to risk the threat of an enforcement action and "wait for the agency to drop the hammer" in order to obtain judicial review. *Sackett*, 132 S. Ct. at 1372. That was deemed an inadequate remedy because it would expose the Sacketts to "tens of thousands of dollars in civil penalties per day..." *Id.* at 1374 (Ginsburg, J., concurring). A requirement to risk ruinous penalties in order to have an opportunity to contest an erroneous assertion of jurisdiction is simply "unthinkable" "[i]n a nation that values due process, not to mention private property..." *Id.* at 1375 (Alito, J., concurring); *see also Ex Parte Young*, 209 U.S. 123, 146-47 (1908).

But here the Corps maintains that immediate judicial review of an affirmative jurisdictional determination is inappropriate because the Respondent may obtain judicial review after "applying ... for a permit and then filing suit under the APA if [the application] is denied..." *Sackett*, 132 S. Ct. at 1372. While the Court was unanimous in holding this an insufficient remedy in *Sackett*, the Corps maintains that the prospect of judicial review of a permit denial should be sufficient here because—unlike in *Sackett*—no compliance order has been issued. Pet. Opening Br. at 42-43. Thus the agency maintains that Respondents, Hawkes Co.

Inc, et al. (Hawkes), stand in a different position than the Sacketts because: (a) the company has not been required to remediate any alleged violation; and (b) in the absence of a compliance order, Hawkes has no special burden to meet in order to qualify for a Section 404 permit. Yet this misses the point entirely because it ignores the reality that the Corps' assertion of jurisdiction has *already* interfered with the owner's right to freely use and enjoy the property.

1. Individual Permits Are Exorbitantly Expensive

The reality is that when faced with an affirmative JD, a small business landowner has only one option if pre-enforcement judicial review is unavailable. The owner must submit to a potentially illegally imposed regulatory regime.[6] Accordingly, most small business property owners will feel compelled to either abandon whatever development plans they might have in mind, or to pursue a federal permit to carry-out those plans. Either way, their constitutionally protected common law property rights are infringed, as if the property was deemed subject to a federal conservation easement.

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[6] The owner is faced with a Hobson's choice: either (a) ignore the jurisdictional determination, and risk crippling daily fines and or imprisonment, or; (b) submit to a potentially unlawful regulatory regime. This is an ultimatum with constitutionally repugnant choices on both sides of the equation. Yet, to the extent a choice must be made, any reasonable person would yield to the Corps' implicit directive to either: (i) leave the affected portions of the land undeveloped, or (ii) pursue a permit.

To be sure, if CWA jurisdiction is assumed without opportunity for judicial review, the owner has no choice but to operate within that regulatory framework. Under such a regime the owner is no longer free to proceed even with the most basic of plans. Something as simple as laying down mulch would be considered a "discharge of pollutants," and might result in crippling penalties. 33 U.S.C. § 1362(6). For this reason, the owner must be abundantly sure that he or she is covered by either a general or individual permit for any contemplated use.

In this case the Corps told Hawkes that it would need a special permit, which would cost over $100,000. Reply Br. of Resp. at 11. But, as of 2002 the *average* cost of pursuing an individual permit was $271,596. With inflation that figure must be adjusted upward to $357,826.[7] These figures include the cost of man-hours invested in working toward permit approval, as well as the cost of hiring outside experts to assist with compliance—including environmental testing and project redesigns. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 60 (2002).

Further, these regulatory hurdles prevent the owner from beginning any sort of development for

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[7] *Amicus* relies on the CPI Inflation Calculator provided by the U.S. Department of Labor Bureau of Labor Statistics, available online at http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 29, 2016).

years at a time. *Rapanos*, 547 U.S. at 721 (noting that individual permits take on average 788 days). And that is assuming the Corps might eventually issue a permit. But, until the Corps deems a permit application complete, there is no end to the permitting process. Sunding & Zilberman, 42 Natural Resources J. at 64. For the affected landowner, that means development rights are restricted indefinitely. *Cf. Moore v. United States*, 943 F. Supp. 603, 612 (E.D. Va. 1996) (recounting testimony from former officials that—in order to avoid judicial review—the Corps rarely denies a permit application outright, but will instead typically request "more and more information ... until eventually the applicant loses staying power...").

2. General Permits Burden Constitutionally Protected Property Rights

The Corps seeks to downplay these compliance costs, in part by insisting that "individual permits are the exception, not the rule, especially for smaller projects likely to be undertaken by individuals or small businesses." Pet. Br. at 47. Instead the Corps suggests that most small projects may be carried out under a "general permit," which authorizes "specific categor[ies] of activities deemed to have minimal [environmental] impacts." H. Michael Keller, *Look Before You Fill! Dredge and Fill Permitting Under § 404 of the Clean Water Act*, 17-Nov. Utah Bar B.J. 26, 32 (2004). Accordingly, a landowner might proceed with a

specified project under a general permit, but only if he or she is sure that the project is fully compliant with *regulatory restrictions imposed as a condition* of the Corps' approval. *Id.*

The situation is no different than if municipal authorities should purport to impose zoning restrictions on a specific parcel while denying the owner the right to contest the validity of those restrictions.[8] In this case, however, the landowner risks losing his or her home, or going to jail, if he or she should choose to ignore the authorities. To be sure, the landowner is not at all free—under this imposed regime—to exercise common law property rights. The requirement to obtain a general permit means that the landowner may only use the property on the Corps' terms. Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 Pace Envtl. L. Rev. 35, 68 (2009).

Thus for example, the owner may not initiate many projects without first providing the Corps with

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[8] There is no requirement to apply for a permit in order to ripen a due process claim. Such a claim ripens as soon as the restriction is definitively imposed. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005) (holding a restriction may be challenged immediately if there is no procedure for variance); *see also Harris v. Cty. of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990) (recognizing a ripe due process claim where landowner was "deprived of the commercial use of his land and [required to] pay $2,400 to $3,000 to either regain that use, or prompt the County to make a final determination of how he can use the land."); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 895 (6th Cir. 1991) (holding a due process claim ripe because the landowner was "placed in a position where he would be required to expend considerable time, effort, and money to restore the *quo ante*.").

pre-construction notice at least 30 days. *Id.* at 69-70. For some projects a general permit will only be issued with express authorization from the agency—meaning that the Corps will scrutinize the project, and may require the owner to alter development plans to minimize potential impacts, or may impose other conditions restricting permissible uses as deemed appropriate to protect natural resources.[9] *Id.* at 70. For that matter, most general permit authorizations are conditioned on a requirement that the project must not affect more than one-quarter acre of land. Sunding & Zilberman, 42 Natural Resources J. at 65.

Further, some general permits require specific design elements—which may require costly project modifications. *Id.* at 66 (explaining a requirement mandating vegetative buffers). And many are expressly conditioned on a requirement that the owner must pay to mitigate any perceived impact on wetlands. Davison, 26 Pace Envtl. L. Rev. at 57. Thus notwithstanding the fact that a landowner might adamantly disagree with the Corps' assertion of CWA jurisdiction, the owner can only proceed under such a general permit to the extent he or she properly pays to mitigate for the alleged environmental impact—which necessarily imposes substantial costs.

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[9] By contrast, other general permits are deemed automatically granted if the owner proceeds in accordance with the stipulated conditions. *Id.* at 67. But if the Corps makes no individualized determination as to whether such a general permit should be issued, then *Amicus* questions what event would ever trigger an opportunity for judicial review under the Corps' theory that an approved JD may not be challenged in court?

And speaking of compliance costs, it is disingenuous for the Corps to suggest that general permitting costs are insignificant.[10] While it is true that the process of obtaining a general permit is more streamlined, the costs are still substantial. As of 2002 the average cost of a general permit was $28,915—which amounts to $38,095 in 2016.[11] *Rapanos*, 547 U.S. at 721. Such a toll on the right to use one's own property can hardly be considered inconsequential, especially if the requirement is imposed without any legitimate basis in the law.

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[10] Also the process is not as straightforward as the Corps would suggest. For ranchers, farmers, and other ordinary landowners the process of obtaining a general permit may seem bewildering. They will typically either rely on direction from the Corps as to whether they may proceed with a contemplated project, or will be forced to invest limited time and energy trying to sort through available guidance, which in all likelihood will be difficult for someone who is not already well versed in the intricacies of environmental law.

[11] "The range of NWP costs was between $2,000 and $140,076 [or $2,635 and $184,549 with inflation]; the median cost was $11,800 [or $15,546 in 2016]." Sunding & Zilberman, 42 Natural Resources J. at 74.

II. The Administrative Procedures Act Should Not be Construed in a Manner that Would Facilitate Violations of Due Process

A. The Agency Inappropriately Presupposes its Jurisdictional Powers

The Corps maintains that its jurisdictional determinations have no legal effect whatsoever. Pet. Opening Br. at 27. This poker face argument proceeds on the theory that it was Congress—not the agency—that chose to impose development restrictions on the subject property. On this view the Corps is merely the harbinger of bad news when it determines that a property contains jurisdictional waters. But this is a straw man argument. The Corps never responds to the contention that the agency has unlawfully asserted regulatory authority over the property in question.

Instead the Corps engages in question-begging in much the same way as EPA did when defending its contention that landowners had no opportunity for judicial review of an enforcement order. *Sackett*, 132 S. Ct. at 1373. As in *Sackett*, the agency stubbornly defies "the APA's presumption of reviewability for all final agency action[.]" 132. S. Ct. at 1374. But at least in *Sackett* the agency attempted to offer a textual argument for why Congress might not have wanted to allow judicial review—though this Court ultimately found it uncompelling. *Id.* at 1373-74. Yet, unlike in *Sackett*, the agency defends its prerogative to evade judicial

review in this case merely be doubling-down on its (potentially errant) assertion that the property contains jurisdictional waters.

The Corps operates as if its determination of jurisdiction is beyond reproach. But the agency is far from infallible, and may be wrongly asserting jurisdiction here. *See e.g.*, *Res. Investments, Inc.*, 85 Fed. Cl. at 461-62. (noting that the Corps held up a project for approximately a decade after "'unreasonabl[y]' assert[ing] jurisdiction..."). And if the assertion of regulatory power over this property is wrongful then the Corps' JD is the source of the legal injury—not any act of Congress. But until an Article III Court is allowed to review the agency's assertion of jurisdiction it cannot be said whether or not the subject property really is subject to the CWA's restrictions. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (holding that executive actors are "officers of the law[,]" and that their actions are subject to judicial review when an individual's rights are affected).

B. It is the Exclusive Role of the Courts to Determine Legal Rights and Obligations

Under Article III, it is the role of the courts to determine questions of federal law, affecting the rights of individuals, because otherwise the executive would be allowed to act unchecked—*outside the law*. *St. Joseph Stock Yards Co.*, 298 U.S. 38, 84 (1936) (Brandeis J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an

erroneous rule of law was applied..."). A corollary principle is that an individual has a fundamental right to judicial review when his or her federal rights are adversely affected by final agency action. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920); *Cf.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-31 (1816) (concluding that federal courts must be authorized to hear federal claims). Especially "[w]hen dealing with constitutional rights... [due process demands that] there [] be [an] opportunity of presenting ... [to a court] every question of law raised..." *St. Joseph Stock Yards Co.*, 298 U.S. at 77 (1936) (Brandeis J., concurring); *see also* Sir. William Blackstone, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 137 (Oxford, Clarendon Press, 1765-69) (commenting on Chapter 29 of Magna Carta: "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.") (alteration of original).

Thus judicial review is imperative for any executive determination of an individual's rights or obligations where a violation of due process would result from an errant determination.[12] And that is necessarily the case where the agency's determination effectively deprives an individual of liberty, or impairs property rights, without any legitimate basis in the law. *See* Nathan S. Chapman

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[12] *Marbury* emphasized that "where there is a legal right, there is also a legal remedy[,]" and that "the very essence of civil liberty consists in the right ... to claim the protection of the laws..." 5 U.S. (1 Cranch) at 163.

& Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established legal rights without legal authorization..."). Accordingly, the Corps' position, in this case, raises grave due process concerns because it seeks to insulate its jurisdictional determination from judicial review—notwithstanding the reality that it has decided upon a question of law both as to the reach of its authority and the application of restrictions on the subject property.

Crowell v. Benson is instructive. 285 U.S. 22 (1932). The case concerned the proper application of the Harbor Workers' Compensation Act, which vested a commissioner of the Department of Labor with authority to issue compensation awards in cases where an employee was injured in the course of work occurring upon the "navigable waters of the United States." This jurisdictional provision was not merely a statutory restriction on the commissioner's authority, but also a constitutional limit. *Id.* at 54-55. Accordingly, in *Crowell*, an employer sought to contest a compensation award on the ground that the claimant's injury did not occur during the course of employment within the "navigable waters of the United States." *Id.* Writing for the Court, Chief Justice Hughes, was emphatic in affirming the prerogative of the courts in determining whether the executive branch had reached beyond its jurisdiction. *Id.* at 56; *see also Ng Fung Ho v. White*, 259 U.S. 276, 285-86 (1922) (holding that due process requires an opportunity to contest an alleged ultra vires executive decision affecting liberty or property).

These cases affirm that to deny the opportunity for judicial review would be to deny due process of law. For this reason the Administrative Procedures Act must be interpreted—under the canon of avoidance—so as to allow an affected landowner an immediate right of judicial review once the Corps issues a final determination that his or her property is subject to CWA regulation. *See Crowell*, 285 U.S. at 62 (construing a statute as authorizing judicial review to avoid due process concerns); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 134 (1974) (rejecting an interpretation of the Rail Act that would deny a judicial remedy for parties alleging a violation of constitutional rights, in part because of the "grave" constitutional problems that would arise). This is imperative both to protect the constitutional rights of individuals and to ensure that the Corps is acting *within the law*.

CONCLUSION

This Court should hold that landowners may seek judicial review under the Administrative Procedures Act once the Corps issues an affirmative JD, and affirm the judgment of the Eighth Circuit.

Respectfully submitted,

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In The
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATES OF NORTH DAKOTA, ALASKA, COLORADO, SOUTH DAKOTA, NEBRASKA, AND IDAHO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. § 1362(7); *see* 33 U.S.C. § 1251 *et seq.*, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

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INTEREST OF THE *AMICI CURIAE*[1]

The Clean Water Act ("CWA") establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). This system of cooperative federalism authorizes the *Amici* States (as defined below) to promulgate water quality standards, designate impaired waters, issue total maximum daily loads, and certify federal permits as compliant with state law.

The States of North Dakota, Alaska, Colorado, South Dakota, Nebraska, and Idaho (collectively, "*Amici* States") are themselves property owners potentially subject to CWA jurisdiction and also administer delegated permitting programs under the CWA. The *Amici* States enforce their state laws regarding clean water, land use, and permitting. The scope and burden of the *Amici* States' authority and obligations under the CWA relies entirely upon the definition of "waters of the United States" under the CWA.

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[1] No party's counsel authored any part of this brief. No person other than the *Amici Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

An Army Corps of Engineers ("Corps") determination that it has jurisdiction over a particular property or waterway deprives *Amici* States of their historic authority to govern their own lands and waters in accordance with their own laws and priorities. At the same time, this jurisdictional determination places a significant administrative burden on the *Amici* States, who must process permit applications, water quality certifications, and take other administrative actions. Jurisdictional determinations also directly impede state interests by requiring states to apply for federal permits for much-needed state and local infrastructure projects, burden these projects with the need to prepare extensive Environmental Impact Statements, require states to invest significant amounts of time and money, and expose the states to litigation risk.

The Corps and Environmental Protection Agency ("EPA") (collectively, "Agencies") have recently issued their Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), codified at 33 C.F.R. 328.1 *et seq.* ("WOTUS Rule" or "Rule"). *Amici* States and other states challenged the WOTUS Rule on the grounds that (i) it exceeds the authority granted to the Corps by Congress in the CWA, (ii) that it was promulgated in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), as the WOTUS Rule itself is arbitrary and capricious because the final rule that was adopted is not a "logical outgrowth" of the proposed rule, and (iii) because the Agencies did not comply with National

Environmental Policy Act ("NEPA"). On the eve of the rule taking effect, a federal district court granted a preliminary injunction, finding that the state challengers had a substantial likelihood of succeeding on the merits and would suffer irreparable harm both to their sovereign authority to manage their lands and to their concrete financial and administrative interests. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *4, *8 (D.N.D. Aug. 27, 2015) (publication pending). The Agencies elected not to appeal.

The challenges to the WOTUS Rule demonstrate that the question of which waters fall within the scope of the CWA is one of enormous importance to state governments as well as private citizens. The need for judicial review of jurisdictional determinations will only grow as the Agencies, the states, and eventually the courts figure out how to apply the WOTUS Rule to individual situations. Without judicial review, the Corps, often acting through individual local agents, will have the incentive to push the boundaries of federal regulatory jurisdiction, secured with the knowledge that challenging their assertions of jurisdiction would be both expensive and risky. And with each new jurisdictional determination, the states' traditional power to regulate their lands and waters will shrink accordingly.

The WOTUS Rule magnifies this problem by asserting jurisdiction over a wide range of dry creek beds and other features. It is clear from the public reaction to the WOTUS Rule, both from state governments

and private citizens, and even from environmental activists, that everyone understands that when the Corps claims jurisdiction, the claim – for better or worse – has a large and immediate impact on the actual legal rights and options of everyone involved in land use and planning.

The *Amici* States, which are potentially subject to the Agencies' expansive assertion of jurisdiction, have a sovereign interest in protecting their ability to govern their lands and waters in the manner chosen by their citizens. Judicial review of jurisdictional determinations by the Corps will provide an important protection for that interest. The *Amici* States therefore urge this Court to affirm the holding of the Eighth Circuit that jurisdictional determinations are judicially reviewable under the APA.

SUMMARY OF THE ARGUMENT

"Regulation of land use is a function traditionally performed by local governments[.]" *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). When the CWA is interpreted expansively, "to claim federal jurisdiction over ponds and mudflats" this "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 161.

The decision of the Eighth Circuit upholds a powerful and important protection for state sovereignty

and the authority of local governments to make local land use decisions without the permission of the federal government. Judicial review is an indispensable bulwark against such "federal encroachment upon a traditional state power." *Id.* at 173. To be effective, however, it must actually enable litigants to challenge the jurisdiction of the Corps over their lands and waters – without having to first submit to that jurisdiction and undergo a protracted and costly permitting process or risk criminal prosecution. *Amici* States urge this Court to affirm.

The parties and the Eighth Circuit all agree that the question of whether an individual jurisdictional determination under 33 C.F.R. 331.2 *et seq.*, is a final agency action subject to judicial review under the APA turns on whether it is an agency action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation omitted). This question exists in the shadow of a larger debate over a new rulemaking that articulates a sweeping new definition of the statutory term "waters of the United States."

The Corps has shown a consistent pattern of adopting an interpretation of the CWA that "invokes the outer limits of Congress' power," rather than construing the statute more narrowly to avoid potential constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172-73 (quotation omitted). And on June 29, 2015, the Corps

and the EPA issued the WOTUS Rule – thereby effectively expanding the definition of "waters of the United States" and dramatically displacing state authority over water quality and land and water resources. The question in this case – whether an individual jurisdictional determination under 33 C.F.R. 331.2 *et seq.*, is a final agency action subject to judicial review under the APA – thus exists in the shadow of a larger debate over the WOTUS Rule's sweeping new definition of the statutory term "waters of the United States."

Amici States and other states have been at the forefront of litigation over the WOTUS Rule, which they are challenging in the District of North Dakota. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS. Last summer, that district court issued an order granting a temporary injunction in that case, finding that "[t]he States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule," *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *4 (D.N.D. Aug. 27, 2015) (publication pending); there is "irreparable harm" because "the States will lose their sovereignty over intrastate waters" and will "incur monetary losses as a result of an unlawful exercise of regulatory authority," *id.* at *7; and that the balance of harms favors the States because the harm is "both imminent and likely," *id.* at *8. The Sixth Circuit has also granted a temporary stay of the WOTUS Rule on the same grounds. *In re E.P.A.*, 803 F.3d 804, 808-09 (6th Cir. 2015).

Whatever the outcome of these challenges, the WOTUS Rule will inevitably spawn a new set of controversies over the scope of CWA jurisdiction, as parties challenge the validity of the WOTUS Rule and its application in specific situations. If the WOTUS Rule is invalidated, any new rule that is promulgated will also ultimately require clarification and application. But if the Court adopts the Corps' position in this case, there will be a long and unnecessary period of confusion and frustration as parties wishing to challenge new jurisdictional determinations under the WOTUS Rule work their way through a costly and complicated permit process – or face the risk of monetary penalties and jail time. Allowing jurisdictional determinations to be challenged as final agency actions, on the other hand, will permit courts to efficiently and authoritatively answer important questions regarding the validity and proper scope of federal regulatory authority. Such clarity is critical for cooperative federalism, state sovereignty, and the rights and responsibilities of everyday citizens.

The debates over the WOTUS Rule directly address the issue before this Court – namely, whether jurisdictional determinations give rise to legal consequences such that they are subject to judicial review. To be sure, in many ways, the WOTUS Rule is simply a jurisdictional determination, applied nationwide, that effectively expands the definition of "waters of the United States" and provides vague, questionable standards regarding how and when CWA jurisdiction applies to different terrain across the country. Yet the

public reaction to the WOTUS Rule confirms that jurisdictional determinations impose severe legal restrictions on their recipients. A Corps jurisdictional determination – whether it be in the form of application of the WOTUS Rule or an individual determination – is made without denying a permit or imposing any immediate penalties that could otherwise be challenged, yet both impose very real costs. Thus, many of the statements made regarding the sweeping effects of the WOTUS Rule apply equally to ordinary jurisdictional rulings such as the one at issue here. The debates surrounding the WOTUS Rule, and the comments provided by parties on all sides of the political spectrum, shed light on the legal and economic effects of rulings regarding jurisdictional waters and belie the Corps' assertion that no real legal consequences flow from its jurisdictional determinations. This larger controversy also illustrates the very real economic and administrative costs of the uncertainty surrounding CWA jurisdiction, and the way that this uncertainty empowers federal agency officials at the expense of both the states and private actors.

Just as the WOTUS Rule imposes imminent and substantial harms on *Amici* States and others, the Hawkes Co., Inc. jurisdictional determination and thousands of other jurisdictional rulings made by the Corps have imminent and substantial legal effects on their recipients – making them final agency actions under the APA.

Amici States respectfully submit this brief to ensure the Court is aware of the other important recent developments in this area of law, the importance that judicial review takes on in this evolving area of jurisdiction, and the evidence that has emerged during the debates over the WOTUS Rule that further demonstrates the very real and immediate effects of the Corps' jurisdictional determinations.

ARGUMENT

I. The WOTUS Rule underscores the critical need for judicial review.

The ongoing legal challenges to the WOTUS Rule are valid and ripe under the APA, whether or not individual jurisdictional determinations are found to be final agency actions, because it is a final rulemaking that is intended to carry the force of law. 5 U.S.C. § 704.

The WOTUS Rule, which was scheduled to go into effect on August 28, 2015, WOTUS Rule, 80 Fed. Reg. at 37,054, has now been stayed and enjoined temporarily by two courts. *In re E.P.A.*, 803 F.3d 804, 808-09 (6th Cir. 2015); *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *8 (D.N.D. Aug. 27, 2015) (publication pending).

Under the WOTUS Rule, the Corps will not reopen currently valid jurisdictional determinations or revoke valid permits, but "jurisdictional

determinations and requests for authorization requiring an approved jurisdictional determination issued on or after the effective date of this rule will be made consistent with this rule." WOTUS Rule, 80 Fed. Reg. at 37,074. Thus, depending on the outcome of the legal challenges, the Corps will soon begin to issue new jurisdictional determinations applying its new and complicated regulation, or, if that is struck down, applying existing law or whatever replacement regulation is ultimately adopted.

If the WOTUS Rule is not invalidated, it will spawn hundreds, perhaps thousands, of smaller challenges to clarify its application in particular circumstances, and a ruling in favor of the Corps in this case would significantly impede judicial review of those challenges.

A. Judicial review of jurisdictional determinations will assist in implementing the CWA.

Even if the WOTUS Rule is found to be properly promulgated and consistent with the CWA as a whole – not a result *Amici* States think likely – that does not mean it will be found lawful as applied to each particular situation. It will be necessary not only to look at the WOTUS Rule in general and the question of whether it is a reasonable interpretation of the CWA, but also to determine whether the application of the WOTUS Rule to a particular pothole or arroyo exceeds the Corps' jurisdiction under the CWA. "[T]he

entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls, [and] [a]ny plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Rapanos v. United States*, 547 U.S. 715, 722 (2006).

Allowing judicial review of jurisdictional determinations will allow courts to authoritatively resolve disputes over the WOTUS Rule without first waiting years for permit applications to work their way through the system or dealing with the complications of heavy civil and criminal penalties. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Where the Corps overreaches its jurisdiction, the courts may step in and say so thereby establishing helpful precedent that will guide future cases. Similarly, when the Corps properly asserts its jurisdiction, the courts will help prevent needless challenges to the Corps' lawful exercise of its authority. In a system that depends largely on voluntary compliance, it is important for the people who receive jurisdictional determinations to be secure in the knowledge that the Agencies appreciate the limits of their authority.

Either way, controversies can be considered and efficiently resolved. In the presence of a sweeping and controversial new rulemaking, "a pre-enforcement challenge is calculated to speed enforcement." *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). When the government prevails, it has a binding

decision to encourage compliance, and if it loses it can make prompt changes to the initial decision. *Id.*, *see Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 581 (1985) ("Doubts about the validity of [the Federal Insecticide, Fungicide, and Rodenticide Act]'s data-consideration and compensation schemes have plagued the pesticide industry and seriously hampered the effectiveness of FIFRA's reforms of the registration process."); *see also Bell v. New Jersey*, 461 U.S. 773, 780 (1983).

As the Corps, state governments, and landowners grapple with the problem of interpreting and applying the WOTUS Rule, they will benefit from the ability to obtain judicial review of jurisdictional determinations without the complications that come with the enforcement of civil and criminal penalties.

B. The WOTUS Rule will not end the controversy over the meaning of the term "waters of the United States" and will require extensive and highly controversial case-by-case application.

Judicial review will be necessary and valuable even if, as the Agencies claim, the WOTUS Rule ultimately does "provide[ ] greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities would need to make jurisdictional determinations on a case-specific basis." WOTUS Rule, 80 Fed. Reg. at 37,054. Even well-written, straightforward rules

require interpretation when they deal with a question as complicated as CWA jurisdiction, as new and unexpected issues arise and need to be resolved.

But it is hard to believe the WOTUS Rule will actually create the desired clarity. Many commenters and others have expressed concern that the WOTUS Rule raises as many questions as it answers; inevitably, these questions are likely to lead to further litigation. *See, e.g.*, Public Comment Letter, Re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880) (dated Oct. 8, 2014), available at http://www.ago.wv.gov/pressroom/Documents/WOTUS%20Comment%20Letter%2010-8-FINAL.pdf.

As just one example, the district court in North Dakota credited testimony that language in the WOTUS Rule might cover previously non-jurisdictional prairie and desert features, finding that the Rule would involve "vast expenditures to map and survey large portions of the state" and lead to "expansion of permitting, oversight, technical and legal analysis for reclamation and development projects." *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7 (D.N.D. Aug. 27, 2015) (publication pending).

The reasons for concern and confusion about the WOTUS Rule's new sweeping effects and consequences are also obvious from the face of the Rule. The WOTUS Rule declares that "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" as well as "[a]ll interstate waters, including interstate wetlands" and "the territorial seas" are per se jurisdictional waters. 80 Fed. Reg. at 37,104. All intrastate "tributaries" of primary waters are per se jurisdictional waters. *Id.* The term "tributary" has been one focus of the debate.

The WOTUS Rule defines "tributary" as "a water that contributes flow, either directly or through another water" to a primary water and "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." *Id.* at 37,105. A water is defined as a tributary even if it has man-made or natural interruptions, or breaks, "so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id.* at 37,106. An "ordinary high water mark" ("OHWM") is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means." *Id.*

Thus, the WOTUS Rule's definition of tributary sweeps within the Agencies' authority ephemeral

streams and channels that are usually dry. It also makes man-made features such as ditches, not specifically excluded, per se jurisdictional by sweeping them into the definition of tributary. Under the WOTUS Rule, all intrastate waters "adjacent" to primary waters, impoundments, or tributaries are per se jurisdictional. 80 Fed. Reg. at 37,104. "[A]djacent waters" are waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries. *Id.* at 37,105. The category includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* It also includes wetlands within or abutting the ordinary high water mark of an open water, such as a pond or lake. *Id.*

These definitions are neither simple nor straightforward to apply, and they have already been challenged in the pending WOTUS Rule litigation as incompatible with the language of the CWA and traditional state authority over land use and water. And even if these definitions were perfectly clear, numerous determinations are still left to case-by-case application. The WOTUS Rule permits the Agencies to exercise authority on a case-by-case basis over a water not covered by any other part of the Rule – i.e., not already included in a per se category – that alone or in combination with other similarly situated waters have a "significant nexus" to a primary water. 80 Fed. Reg. at 37,104-105.

This includes five enumerated geographic features, including prairie potholes, regardless of how

remote they are to a primary water. The WOTUS Rule also includes within federal jurisdiction, on a case-by-case basis, "[a]ll waters [at least partially] located within the 100-year floodplain of a" primary water that have a significant nexus with a primary water. *Id.* at 37,105. It further includes, on a case-by-case basis, "all waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary that have a significant nexus to a primary water. *Id.*

The case-by-case test the Agencies will apply under the WOTUS Rule is whether waters alone or in combination with "similarly situated waters in the region significantly affect[ ] the chemical, physical, or biological integrity" of a primary water. *Id.* at 37,106. "Region" is defined as "the watershed that drains to the nearest [primary water]." *Id.* Waters with only a shallow sub-surface connection or no hydrologic connection whatsoever to a primary water, impoundment, or tributary can satisfy this test.

This new, complex patchwork of language will inevitably give rise to a new set of applications for jurisdiction determinations. Judicial review is the only way to ensure that these disputes are handled promptly and in an even-handed and consistent fashion.

That is particularly true given that the Corps has earned a reputation for using unclear rules to give its local agents more discretion: "The Corps' enforcement

practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (quoting U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, at 22, 26 (Feb. 2004)). Judicial review of jurisdictional determinations will provide important sideboards to guide the Corps in its application of the WOTUS Rule, facilitate uniformity across agencies, and provide a critical check on federal regulatory discretion.

As the CWA and the courts recognize, states have a constitutional right to maintain their "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174; *see, e.g.*, *Hess*, 513 U.S. at 44 ("[R]egulation of land use [is] a function traditionally performed by local governments"). Consistent with this authority, the states have enacted comprehensive regulatory schemes to protect, maintain, and improve the quality of waters in their state, consistent with the CWA's overall goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Each time the Corps makes a jurisdictional determination, it deprives the states of further authority over their own land. And if the Corps'

jurisdictional determination is excessive, it wrongly deprives states of that authority.

There are excellent reasons why state and local governments are often better situated to determine whether diverting a creek or draining a puddle is a good balance between environmental protection and economic development: They have greater familiarity with the climate and geography of their own countryside, and they are more answerable to the local electorate and the needs of the people in their communities. Alaska is but one salient example: The State has over 174 million acres of wetlands – more than all the other states combined – many of which are remotely located far from any navigable waterbody. Because Alaska's wetlands comprise 43% of the State's surface areas, more often than not important public infrastructure development projects like water and sewer, roads, or airport projects involve work in wetlands or non-navigable waters. And many of the State's wetlands are underlain with permafrost, which form a nearly impervious frozen layer of soil that creates seasonally saturated soil conditions above the frozen layer during Alaska's short summer months. Alaska is the *only* state with lands affected by pervasive permafrost conditions, and has long protected these and other important resources under its own statutory and regulatory authority. *See, e.g.*, 33 U.S.C. § 1341 (CWA Section 401 certification authority); AS 46.03.100 (wastewater discharge permitting authority); 18 AAC 70 (Alaska Water Quality Stanards); 18 AAC 772

(wastewater disposal); and 18 AAC 83 (Alaska Pollutant Discharge Elimination System Program (APDES)).

Judicial review of jurisdictional determinations is therefore necessary to preserve the proper balance between state and federal authority that is fundamental to the scheme of cooperative federalism that Congress enacted in the CWA.

II. In the context of the WOTUS Rule, both the Corps and courts have made findings that official decisions of the Corps regarding the scope of its jurisdiction determine the "rights or obligations" of parties and give rise to "legal consequences."

A jurisdictional determination is a final agency action, subject to judicial review under the APA, if it "mark[s] the consummation of the agency's decisionmaking process [and is] one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (quotation omitted). It is undisputed that a jurisdictional determination is "the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority." *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 999 (8th Cir. 2015); Brief for the Petitioner at 25. So, this case turns on whether legal consequences flow from the Corps' determination that it has CWA jurisdiction.

In its opening brief, the Corps attempts to characterize its jurisdictional determinations as helpful

suggestions – rather than legal decisions that impose real obligations on their recipients. The horrified reaction of these recipients when they receive this "help," however, is revealing. Nowhere is this more clearly seen than in the public, and judicial, reaction to the Corps' WOTUS Rule.

The legal effects of the WOTUS Rule (particularly its per se rules) are, in many respects, the same as the legal effects of the jurisdictional determination at issue here. The WOTUS Rule conclusively determines the existence of "waters of the United States" and the application of the CWA, without itself being a permit grant or an enforcement action. *See* 80 Fed. Reg. at 37,056 (stating the Rule will replace the need for jurisdiction determinations in many cases). "This final rule does not establish any regulatory requirements, [but] [i]nstead it is a definitional rule that clarifies the scope of the 'waters of the United States.'" *Id.* at 37,054.

A. Across the political spectrum, there is general agreement that jurisdictional determinations are highly consequential and impose significant restrictions.

Although the Agencies describe the WOTUS Rule as a "clarification" and repeatedly state that they do not believe that it significantly expands jurisdiction, this claim has been met with widespread skepticism. It appears the Corps is the only one attempting to argue the WOTUS Rule is inconsequential. Whether

they favor or oppose the WOTUS Rule, nearly everyone agrees that a determination that a particular wetland or ditch falls within the CWA jurisdictional waters will have serious consequences for the parties involved. Even the Agencies admit that the WOTUS Rule would have significant consequences: "The rule will ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency." *Id.*

Outside groups from all parts of the political spectrum have not been shy about stating the very substantial effects that this jurisdictional regulation will have. The New York Times described it as "a sweeping new clean water regulation meant to restore the federal government's authority to limit pollution in the nation's rivers, lakes, streams and wetlands." Coral Davenport, *Obama Announces New Rule Limiting Water Pollution*, N.Y. Times, May 27, 2015, available at http://www.nytimes.com /2015/05/28/us/obama-epa-clean-water-pollution.html.

The Sierra Club issued a press release proclaiming that "[t]he new rule will finally restore protections, as originally intended, to almost all of the nation's fresh waters – ensuring safe drinking water for 117 million Americans." Press Release, Sierra Club, Proposed Rule Will Protect Drinking Water for 117 Million Americans (March 25, 2014), available at http://content.sierraclub.org/press-releases/2014/03/sierra-club-praises-new-clean-water-safeguards. The Chamber of Commerce, on behalf of 375 organizations, worried that the WOTUS Rule would transform the

Corps into "a central authority that makes the key decisions on many kinds of land and water uses." Public Comment Letter, Re: Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014); Docket No. EPA-HQ-OW-2011-0880 (Nov. 12, 2014), at 2, available at https://www.uschamber.com/sites/default/files/11.12.14-_multi-organization_comments_to_epa_and_usace_on_proposed_rule_definition_of_waters_of_the_united_states.pdf.

This intense interest in the Corps' jurisdictional determination is shared by state Attorneys General and Governors, who fear that the Corps "seeks to place the lions' share of intrastate water and land management in the hands of the Federal Government." Public Comment Letter, Re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880) (Oct. 8, 2014), available at http://www.ago.wv.gov/pressroom/Documents/WOTUS%20Comment%20Letter%2010-8-FINAL.pdf.

"Inclusion of a water as a 'water of the United States' triggers the CWA's onerous permitting requirements an expensive and uncertain process, which can take years and cost tens and hundreds of thousands of dollars." *Id.* "If a pollution event occurs,

it must be dealt with; however, this rule creates the potential for federal permitting, penalties, and responsibility surrounding every waterbody[.]" Public Comment Letter, Re: Comments of the State of North Dakota on the Proposed Definition of Waters of the United States (Docket ID No. EPA-HQ-OW-2011-0880) (Nov. 14, 2014) at 3, available at http://www.nd.gov/ndic/ic-press/WOTUS-comments.pdf. "EPA and cooperating federal agencies are appropriating for themselves the authority to become the arbiter of all economic enterprises and the power to impede or vet them at will." *Id.* at 3-4.[2] "[A]ny efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government[.]" Resolution of the Western States Water Council regarding Clean Water Act

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[2] The facts of this current case validate the concern that the Corps can use its jurisdictional determination power to vet and veto economic activity. "At a January 2011 meeting, Corps representatives urged [Kevin] Pierce[, part owner of two companies attempting to develop,] to abandon his plan, emphasizing the delays, cost, and uncertain outcome of the permitting process
In March, the Corps sent a letter advising it had made a 'preliminary determination' the wetland is a regulated water of the United States and, 'at a minimum,' an environmental assessment would be required. At an April meeting, a Corps representative told Pierce a permit would take years and the process would be very costly. During a site visit in early June, another Corps representative told a Hawkes [Co. Inc.]employee that 'he should start looking for another job.'" *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 998 (8th Cir. 2015).

Jurisdiction, Position No. 369 (July 18, 2014), at 1, available at http://www.westernstateswater.org/wp-content/uploads/2012/10/369_WSWC-CWA-Jurisdiction-Resolution_2014July18.pdf.

A particularly revealing comment was submitted to the Corps from the Hawaii Department of Transportation ("HDOT"), beseeching the Corps to clarify that its municipal sewer system is not a water of the United States because "[o]nce a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving HDOT vulnerable to citizen lawsuits if the federal permit process is not significantly streamlined."[3] Public Comment of HDOT, (Docket ID No. EPA-HQ-OW-2011-0880) (Oct. 20, 2014), Doc. 10184, at 36 available at http://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_6_ditches.pdf.

There thus appears to be a public consensus, from across the political spectrum, including both private organizations and state governments, that formal determinations of jurisdiction by the Corps

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[3] Hawaii was one of seven states that filed a motion to intervene in the Sixth Circuit in support of the WOTUS Rule. *See In re: Environmental Protection Agency and Department of Defense*, Case No. 15-3751 (6th Cir.), Motion by States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington, and the District of Columbia, to Intervene in Support of Respondents in Docket No. 15-3751 and In Each of the Related Cases, Aug. 28, 2015, Doc. No. 19.

impose immediate and severe legal obligations on state and local governments, landowners, and project proponents. The Agencies appear to be almost alone in their attempt to argue otherwise. Because these jurisdictional determinations are formal and final determinations with real and substantial consequences, they ought to be treated as final agency action under the APA.

B. Courts considering the WOTUS Rule have found, based on evidence presented, that assertions of jurisdiction will result in immediate and significant economic harms, as well as injury to the authority of states to manage their own lands and waters.

Courts considering challenges to the WOTUS Rule, similarly, have not had any difficulty concluding that this jurisdictional rule would inflict a substantial and immediate impact – an "irreparable injury" – on both the states bringing the challenges and other regulated parties. This injury would occur independent of any decision that the Corps might later make regarding permits or enforcement actions.

When the District of North Dakota recently enjoined the WOTUS Rule, it found the Rule would result in irreparable injury. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7 (D.N.D. Aug. 27, 2015) (publication pending). The Sixth Circuit reached a similar conclusion and stayed the WOTUS Rule nationwide until jurisdictional

briefing could be completed. "[T]he sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *In re E.P.A.*, 803 F.3d 804, 808-09 (6th Cir. 2015). The District of North Dakota specifically found that there would be irreparable injury to the sovereign interests of states, to their direct financial interests, and to the taxpayers and citizens. *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7-8 (D.N.D. Aug. 27, 2015) (publication pending). These same types of injuries arise – on a smaller scale – from all jurisdictional determinations.

First, and most importantly, each expansion of federal jurisdiction comes at the expense of the ability of state and local governments to control their own lands and waters. The CWA establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). When a water, or pothole, does not fall under CWA jurisdiction, it is regulated under state and local law. *See* Alaska Stat. 46.03.050 *et seq.*; N.D. Cent. Code §§ 61-28-01 *et seq.*; Wyo. Stat. Ann. §§ 35-11-301 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; S.D. Codified Laws §§ 34A-2-1 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. § 8-4-101 *et seq.*

"Once the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act." *North Dakota v. U.S. E.P.A.*, No. 3:15-cv-00059-RRE-ARS, 2015 WL 5060744 at *7 (D.N.D. Aug. 27, 2015) (publication pending). "Immediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters." *Id.* An individual jurisdictional determination similarly has the immediate legal effect of displacing state authority – whether or not the Corps ultimately grants a permit or brings an enforcement action. That is a concrete legal effect, no less than the impact of the WOTUS Rule.

The district court in North Dakota also found that the WOTUS Rule would inflict irreparable monetary harm. *Id.* "These losses are unrecoverable economic losses because there is neither an alternative source to replace the lost revenues nor a way to avoid the increased expenses." *Id.* The court made this finding based on evidence submitted by state officials charged with administering environmental programs and programs that frequently require CWA permits. For example, the North Dakota State Engineer, who is charged with "managing and directing all responsibilities of water appropriation, floodplain management, regulation of dikes, dams, and drainage, and determination of the ordinary high water mark and sovereign lands management" submitted a declaration describing his experiences with the CWA permitting system. *North Dakota v. U.S. E.P.A.*, No.

3:15-cv-00059-RRE-ARS, at Doc. No. 33-8, at 1-2. He explained that when a prairie pothole or drainage wash is found to be a jurisdictional water, the need to obtain a § 404 permit automatically triggers NEPA, "which creates additional expense and delay for state planning and infrastructure as the agency must provide necessary information to support an Environmental Impact Statement or Environmental Assessment." *Id.* at 4. "The significant delays associated with this process will interfere with the various ongoing infrastructure projects throughout the state." *Id.*

Similar declarations were submitted by environmental and infrastructure agencies in several other states as well, describing the very significant financial and regulatory burdens imposed by the CWA upon a finding of jurisdiction.

The WOTUS Rule's adverse financial impacts on state and local governments further reflect the real-world consequences flowing from the Corps' assertion of federal regulatory authority. Local officials have no choice but to react to the claim of federal jurisdiction and respond to it. For the Agencies to suggest this does not impose a "legal consequence," or determine "rights and obligations," defies reality. That is no less true when the Corps asserts federal authority pursuant to a jurisdictional determination. Judicial review therefore should be, and indeed must be, available under the APA.

The Corps mistakenly contends that "[a]n affirmative jurisdictional determination states the Corps' conclusion that waters of the United States are present at the relevant site, but it does not direct the landowner to take or refrain from taking any particular action, and it does not affect the landowner's ability to seek and obtain a permit." Brief for the Petitioner at 17. But at the end of the day, "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial." *Rapanos*, 547 U.S. at 721. As this Court has recognized, a jurisdictional determination confers on the Corps "the discretion of an enlightened despot[.]" *Id.* And when the Corps flexes its extraordinary regulatory muscle in this manner – regardless of whether it has properly exercised that authority – it alters the legal landscape, compromises a landowner's interest in his or her property, undermines a state's sovereign regulatory authority, and triggers real and immediate costs and consequences that merit judicial review under the APA.

CONCLUSION

The Eighth Circuit correctly decided that jurisdictional determinations are final agency actions, with immediate and serious legal consequences, and subject to review. This review will be particularly

important in the next few years, as the Corps moves to implement it new regulatory scheme.

Respectfully submitted,

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No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* OHIO CHAMBER OF COMMERCE, COLORADO MINING ASSOCIATION, AND OHIO COAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*

The Ohio Chamber of Commerce, the Colorado Mining Association, and the Ohio Coal Association respectfully submit this *amici curiae* brief in support of respondents.*

Founded in 1893, the Ohio Chamber of Commerce (Ohio Chamber) is Ohio's largest and most diverse business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

The Ohio Coal Association (OCA) is a non-profit trade association dedicated to representing the interests of Ohio's underground and surface coal producers. The OCA represents nearly all of Ohio's coal producers and more than 50 associate members, which include suppliers and consultants to the mining industry, coal sales agents and brokers, and allied industries. The Ohio Coal Association is committed to advancing the development and utilization of Ohio coal as an abundant, affordable, and environmentally sound energy source.

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation and submission of this brief. The parties have docketed blanket consents to the filing of *amicus* briefs.

The Colorado Mining Association (CMA), founded in 1876, is a trade association formed under section 501(c)(6) of the Internal Revenue Code whose nearly 1,000 members include the producers of coal, metals, agricultural and industrial minerals throughout Colorado and the west; as well as equipment manufacturers, engineering, consulting and other vendors and service providers to the industry. CMA members generate nearly $3 billion in production value alone in Colorado and the mining industry accounts for nearly 75,000 jobs in the state. CMA's mission is to promote the general health and welfare of the industry before legislatures, regulatory agencies, the courts, and other policy forums, while working to educate and raise public awareness of the importance of mining and mineral products.

As respondents have observed, the government's position in this case that "final agency action" must impose "'independent' legal consequences" threatens to "preclude judicial review of most, if not all, interpretive or declaratory decisions and eviscerate the [Administrative Procedure] Act." Res. Br. at 21. In particular, the government's position would bar preenforcement review of statements by agencies that interpret statutes and regulations. Such statements are "interpretative rules" that can be issued without public notice and comment and have powerful effects.

Amici are interested in preserving the rights of their members to preenforcement judicial review of interpretative rules. A decision by the Court that adopts the government's threshold position that immediate "'independent' legal consequences" are required for agency action to be "final" and subject to judicial review would leave *amici*'s members without recourse against agency fiats that threaten large

projects and investments. Accordingly, *amici* submit this brief in support of respondents to demonstrate that the government's threshold position is contrary to the Administrative Procedure Act and the decisions by the Court which establish that interpretative rules are subject to immediate judicial review when they are issued. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478–79 (2001).

In addition, *amici* address the suggestion that the Corps would respond to an adverse decision in this case by ignoring future petitions for jurisdictional determinations. That would violate the requirements of the Administrative Procedure Act that agencies permit and reasonably consider interpretative rule petitions, in disregard of the rights of *amici*'s members.

BROADER QUESTION PRESENTED

Whether interested persons are entitled to obtain preenforcement judicial review of formal and definitive statements by agencies that interpret statutes and regulations.

SUMMARY OF THE ARGUMENT

The approved jurisdictional determination issued by the Army Corps of Engineers in this case is indisputably an interpretative rule. The Court has held that interpretative rules are subject to judicial review if they constitute "final agency action." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478–79 (2001). The government claims that an approved jurisdictional determination is not a "final agency action" because it does not itself "determine legal rights or obligations or impose legal consequences." Pet. Br. at 17. The government misapplies the Court's decision in *Bennett v. Spear* in claiming such a narrow definition of final agency action. In fact, the government's argument would foreclose judicial review of any interpretative rule, which by definition does not determine legal rights or obligations and does not impose legal consequences. This is a critical case because interpretative rules do not require public notice and comment, leaving judicial review as the last check on this class of agency actions.

This is the government's *third* attempt to have the Court establish a total bar against judicial review of interpretative rules. This attempt should fare no better than its predecessors because the Administrative Procedure Act and the decisions of the Court provide for judicial review of agency interpretative rules. The Act defines its terms so that "final agency action" includes agency statements that interpret law. While such statements are exempt from the notice and comment requirement, the Act conspicuously does not exempt interpretative rules from judicial review The Court decided the question

in *PPG Industries* by holding an interpretative rule qualified as a final agency action subject to judicial review. The government offers no justification for reading a judicial review exemption into the Act and departing from settled precedent.

The government's argument chiefly depends on a misreading of the *Bennett v. Spear* decision as placing severe restrictions on what constitutes a final agency action. The government ignores the Court's subsequent rebuke of this argument in the *American Trucking* decision and further ignores the Court's clarification in the *Sackett* decision that the so-called *Bennett* "prongs" are merely convenient "hallmarks of finality," not requirements.

In short, the government's position is contrary to the Administrative Procedure Act's text, foreclosed by the Court's decision in *PPG Industries*, and has no support in the Court's decision in *Bennett*.

This case has broad and important implications. The government asks the Court to establish in its decision that Congress has foreclosed judicial review completely for an entire class of agency actions for which "there is no other adequate remedy in a court" so long as the agency technically has not "determine[d] legal rights or obligations, or impose[d] legal consequences." Pet. Br. at 17 The Court is asked to deny judicial review no matter how high the stakes are and regardless of whether the agency has committed an egregious and coercive overreach. Immunizing interpretative rules from judicial review would give executive agencies unbridled power to "say what the law is" without judicial review unless and until agencies implement or enforce their legal interpretations in an enforcement action or final permitting decision.

Finally, the government wrongly intimates the Corps will stop issuing jurisdictional determinations if the Court holds they are subject to judicial review. Agencies issue many interpretative rules today undeterred by the availability of judicial review. Further, the Administrative Procedure Act requires agencies to permit and reasonably consider petitions requesting interpretative rules. The Corps cannot categorically refuse petitions from landowners requesting jurisdictional determinations, regardless of whether judicial review is available.

ARGUMENT

I. The government's position jeopardizes judicial review of interpretative rules.

This case concerns a highly important question of administrative law: whether interested persons are entitled to obtain preenforcement judicial review of statements issued by agencies that interpret statutes and regulations.

Interpretative rules "are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1204 (2015). Interpretative rules "do not have the force and effect of law." *Id.* at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). While they are statements "of an advisory character indicating merely the agency's present belief," they have "considerable importance" because "customarily they are accepted as determinative by the public at large" and "courts will be influenced by the administrative opinion." *Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941).

An approved jurisdictional determination is an interpretative rule "stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." 33 C.F.R. § 331.2.

Interpretative rules come in two contexts. First, they are issued by agencies in response "to inquiries from potentially regulated parties." Pet Br. at 23; *see Final Report of the Attorney General's Committee on*

Administrative Procedure 27 (1941) ("[O]ften they are made as a consequence of individual requests for rulings upon particular questions "). Second, they are issued on an agency's own accord. While the interpretative rule in this case is of the former kind, the government does not argue that reviewability depends on whether or not the interpretative rule was issued *sua sponte*.

Interpretative rules have an expedited procedural path because the Administrative Procedure Act exempts the formulation, amendment, and repeal of agency interpretative rules from the requirement to give advance notice and take public comments. 5 U.S.C. § 553(b)(3)(A); 5 U.S.C. § 551(5). In addition, the Administrative Procedure Act requires agencies to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule" and that this extends to a rule that is a "statement of particular applicability and future effect designed to interpret law " 5 U.S.C. § 553(e); 5 U.S.C. § 551(4). Through these provisions, Congress fostered the issuance of interpretative rules.

As demonstrated in the briefing before the Court in *Mortgage Bankers* last term, interpretative rules frequently address highly significant legal issues and have enormous ramifications. Brief for the National Mining Association as Amicus Curiae at 18–26, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041); Brief for the National Federation of Independent Businesses, et al. as Amici Curiae at 14–22, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct.

1199 (2015) (No. 13-1041);[1] Brief for American Hospital Association, et al. as Amici Curiae at 16–20, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[2] Brief for the Chamber of Commerce of the United States of America, et al. as Amici Curiae at 10–22, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[3] Brief for the Cato Institute, et al. as Amici Curiae at 19, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[4] Brief for the Center for Constitutional Jurisprudence as Amicus Curiae at 11–15, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041); Brief for the State and Local Government Associations as Amici Curiae, at 13–15, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[5] Brief for the Thomas Jefferson Institute

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1. National Federation of Independent Businesses, American Farm Bureau Federation, American Petroleum Institute, National Association of Home Builders, and Retail Litigation Center.

2. American Hospital Association, Association of American Medical Colleges, and HealthCare Financial Management Association.

3. Chamber of Commerce of the United States of America, American Fuel and Petrochemical Manufacturers, American Health Care Association, Business Roundtable, National Association of Manufacturers, and Securities Industry and Financial Markets Association.

4. Cato Institute, Competitive Enterprise Institute, and Judicial Education Project.

5. National League of Cities, United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, Government Finance Officers Association, National School Boards Association, National Public Employer Labor Relations Association, and

for Public Policy as Amicus Curiae at 4–5, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041).

The government down plays the importance of jurisdictional determinations, but does not and could not deny that agencies issue interpretative rules that have significant and immediate effects on heavily regulated industries. For example, the mining industry is regulated by a host of federal agencies under a number of statutory regimes that govern where mining may occur, how mining facilities must be designed, operated and constructed, and how mining facilities must be closed and reclaimed at the end of their operating life. The statutes and regulations are beset with vagueness and ambiguity, and penalties for less-than-perfect compliance are very substantial. Federal agencies frequently send letters to mining companies interpreting statutes and regulations that apply to their operations and address significant investment, business, and engineering decisions, such as whether and how to expand operations.

The government also suggests interpretative rules simply provide "useful" "information" and "incentive," Pet. Br. at 16–17, but in practice interpretative rules in fact deliver commands and coercion. Indeed, a mining company's receipt of such a letter and subsequent refusal to conform to the agency's interpretation will be offered as evidence of a willful violation carrying more severe penalties. *See* Pet. Br. at 32 (noting receipt of jurisdictional determination could be offered as evidence to increase penalties).

International Public Management Association for Human Resources.

In many regulatory contexts, the potential risks of resisting an agency interpretative rule are not limited to just civil penalties, but include potential criminal sanctions as well.[6]

Having last term in *Mortgage Bankers* vindicated the right of agencies to issue, amend, and repeal interpretative rules without notice and comment, now the government seeks to shrug off the vital remaining check on the power of agencies to issue interpretative rules with significant coercive effects: the right of judicial review.

Congress intended "final agency action" to "cover a broad spectrum of administrative actions." *Abbott Laboratories v. Garner*, 387 U.S. 136, 140 (1967); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (the Act's judicial review provision "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action"); *Heckler v. Ringer*, 466 U.S. 602, 645 (1984) ("In our system of government under law, administrative absolutism is not the rule, but only the narrow exception."); Transcript of Oral Argument at 40, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062) ("[F]or 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite."); *id.* at 50 ("[T]he Government here is fighting 75 years of practice.").

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6. *E.g.*, 33 U.S.C. § 1319(c)–(d) (Clean Water Act); 42 U.S.C. § 6928(d), (g) (Resource Conservation and Recovery Act); 42 U.S.C. § 7413(b)–(c) (Clean Air Act); 42 U.S.C. §§ 9603(b), 9609(c) (Comprehensive Environmental Response, Compensation, and Liability Act).

Contrary to this congressional intent, the government in this case asks the Court to limit "final agency action" to a narrow set of agency actions that "determine legal rights or obligations, or impose legal consequences," Pet. Br. at 17. If the Court accepts this argument, interpretative rules would be immune from direct judicial review. The government admits in its brief that this is the implication of its position. *Id.* at 33 ("In its lack of legal effect, an affirmative jurisdictional determination is similar to other statements communicating the agency's views about the proper application of relevant statutory provisions to particular factual scenarios."); *Id.* at 34 ("[A] jurisdictional determination is no different from the innumerable opinions that agencies offer to assist regulated entities in understanding the obligations imposed by the governing statute."). Despite the breadth of the claim, the government "relies on no explicit statutory authority for its argument that pre-enforcement review is unavailable" for interpretative rules. *Abbott Laboratories*, 387 U.S. at 141.

II. Formal and definitive interpretative rules are final actions subject to judicial review.

A. The Administrative Procedure Act expressly permits judicial review of interpretative rules.

In this case, just as in *Mortgage Bankers* last term, "[t]he text of the APA answers the question presented." *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1206 (2015). The Act provides a "final agency action" is "subject to judicial review" whenever "there is no other adequate remedy in a court." 5 U.S.C. § 704. The text of the Act indicates that an "agency action" is "final" if it is not "preliminary, procedural, or intermediate." *Id.* The Act then defines the crucial term "agency action" in relevant part to include "the whole or a part of an agency rule," §§ 551(13), 701(b)(2)[7] and the word "rule" is broadly defined to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to interpret law." §§ 551(4), 701(b)(2).[8]

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7. In addition, the term "agency action" is defined to include "the whole or part of an agency order, license, sanction, relief, or the equivalent denial thereof, or failure to act." *Id.*

8. In addition, the term "rule" is defined to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement law or policy," "interpret policy," "prescribe law or policy," and statements "describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." *Id.*

The government admits issuance of an approved jurisdictional determination "marks the culmination" of a "distinct process" in which the Corps determines and states its interpretation of the Clean Water Act as it applies to a landowner's property. Pet. Br. at 26. The government does not claim the Corps' action is "preliminary, procedural, or intermediate." 5 U.S.C. § 704. That should be the end of the matter; the jurisdictional determination is a final agency action under the Administrative Procedure Act.

The government's argument is that an approved jurisdictional determination is not "final agency action" because "it does not impose legal consequences or alter the recipient's legal obligations." Pet. Br. at 26. The government would have the Court read an implied exception into the term "agency action" that would only apply when the phrase "agency action" is used in the judicial review provision in order to cabin the availability of judicial review to a more limited set of actions. But limiting the scope of judicial review under the Act and in certain cases is the job of Congress, not the Court, and the limits Congress has imposed already are adequate.

First, "agency" is defined to expressly exclude Congress, courts of the United States, governments of territories, possessions, and the District of Columbia, courts martial, military commissions, military authority exercised in time of war and in occupied territory, and other entities for which judicial review would not be appropriate. 5 U.S.C. § 701(b). Further, the Court has held the President is not an "agency" that is subject to judicial review under the Act. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Thus, the judicial review provision covers only "action" taken by an "authority of the

Government of the United States" that can properly be subjected to judicial review, such as the Army Corps of Engineers in this case.

Second, judicial review is not available for actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This important exclusion covers a wide range of prosecutorial decisions and similar discretionary judgments for which judicial review would be inappropriate. The approved jurisdictional determinations at issue in this case are not excluded by this provision.

Third, judicial review is not available under the Administrative Procedure Act if "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Thus, Congress limits review in particular circumstances as needed. The Clean Water Act at issue in this case does not preclude judicial review.

Apart from these three textual limits, however, Section 10(c) expressly extended judicial review to "*every* final agency action for which there is no other adequate remedy in any court." Pub. L. No. 79-404, § 10(c), 60 Stat. 237, 243 (1947) (emphasis added).[9] Had Congress intended that only a narrow subset of "rules" and "agency actions" would be subject to judicial review, Congress could easily have enacted additional limits at the outset of the Act's judicial review provision in Section 10 with the others, but Congress did not do so.[10] In stark contrast, Congress

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9. The 1966 codification of the Administrative Procedure Act dropped the word "every" but did not change the substantive meaning of the judicial review provision.

10. Notably, the 1966 codification that was prepared by the House Judiciary Committee less than two decades after the

expressly provided interpretative rules *are* exempt from the Act's procedural requirement to provide public notice and take public comments. 5 U.S.C. § 553(b)(3)(A); *Mortgage Bankers*, 135 S. Ct. at 1203. Congress expressly decided that it was inappropriate to mandate public notice-and-comment for issuance of interpretative rules. At the same time, Congress conspicuously chose *not* to exclude interpretative rules from judicial review This is hardly suprising, for the availability of judicial review of interpretative rules was presumed at the time that the Administrative Procedure Act was drafted. *See Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941) ("[A]gencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language. They are not binding upon those affected, for, if there is disagreement with the agency's view, *the question may be presented for determination by a court*." (emphasis added)).

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passage of the Act expressly incorporates in the judicial review chapter the definition of "agency action" and the definition of "rule." 5 U.S.C. § 701(b)(2) ("'rule' and 'agency action' have the meanings given them by section 551"). This is all the more significant because the House Judiciary Committee only adopted seven definitions in the judicial review chapter, six of which together define the scope of "agency action" subject to judicial review. *Id.* The precise and specific adoption of these definitions in the judicial review chapter reflect a shared understanding that the scope of agency action subject to review is coextensive with the scope of agency action subject to other provisions of the Act except when statutes preclude judicial review and when agency action is committed to agency discretion by law.

The breadth of the availability of judicial review is a direct result of the statutory text. As the Court has explained, "[t]he bite in the phrase" "final agency action" "is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001), for the word "action" is defined to include any "rule," and the term "rule" in the Act "is defined broadly to include 'statement[s] of general or particular applicability and future effect' that are designed to 'implement, interpret, or prescribe law or policy.'" *Mortgage Bankers*, 135 S. Ct. at 1203 (quoting 5 U.S.C. § 551(4)).

B. *The* PPG Industries *decision establishes that final interpretative rules are agency actions subject to judicial review.*

The Court in *Harrison v. PPG Industries Inc.* established that the issuance of a final interpretative rule is an agency action subject to judicial review. Adopting the government's position would require the Court to reverse that decision. But even if the Court "would decide [the issue] differently now than [the Court] did then," *stare decisis* dictates that Court must adhere to its earlier decision unless the government demonstrates a "special justification" "over and above" merely claiming that it "was wrongly decided." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015).

In *PPG Industries*, a chemical manufacturer had "beg[u]n the planning and preliminary construction of a new power generating facility" that included two "waste-heat" boilers. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 582 (1980). A dispute arose over

when the "construction" of the two boilers was "commenced" for purposes of determining if they were subject to a Clean Air Act new source standard that was proposed after planning and preliminary construction of the facility, and this depended on interpeting Section 111(a)(2) of the Clean Air Act as it applied to the particular facts. In addition, a dispute arose over whether the boilers were "fossil fuel-fired steam generators" within the scope of the new source standard promulgated by EPA.

After the agency learned of the project and on the agency's own accord, the EPA Regional Director of Enforcement notified the chemical manufacturer that he concluded "the boilers were subject to the 'new source' standards,' since construction of the boilers themselves had not begun until long after the date on which the standards had been proposed" even though "the boilers were part of an integretated unit, the construction of which had begun before the date of the standards." *Id.* After receiving a response from the chemical manufacterer disputing his conclusion, the Regional Director "reaffirmed his initial decision." *Id.* The chemical manufacturer then petitioned the agency seeking an amended interpretative ruling that "construction" "commenced" prior to proposal of the new source standard, and also an interpretative ruling that the standard at issue covering "fossil fuel-fired steam generators" did "not apply to the type of boilers in question." *Id.* at 583. The EPA Regional Adminstrator answered the petition by letter and concluded that the two waste-heat boilers were subject to the new source standard because the standard applied to boilers of that type and because the "construction" of the two boilers had "commenced" after the proposal of the standard. *Id.*

Thus, the agency issued two interpretative rules that were "statement[s] of particular applicability and future effect designed to interpret law," one interpreting and applying a statutory provision and the other interpreting and applying a regulatory provision. 5 U.S.C. § 551(4). The Court had little trouble holding as a threshold question that the interpretative rules were reviewable "'final action' as that term is understood in the context of the Administrative Procedure Act and other provisions of federal law" because "the Administrator's ruling represented EPA's final determination concerning the applicability of the 'new source' standards to [the chemical manufacturer's] power facility" and "[s]hort of an enforcement action, EPA ha[d] rendered its last word on the matter." *PPG Industries*, 446 U.S. at 586. The Court did not apear in the least bit "reluctant to hold" that EPA's statements interpreting a statute and a regulation were "immediately reviewable." *Cf.* Pet. Br. at 23 (citing lower court decisions evidencing reluctance).

Thus, the Court decided in *PPG Industries* that an interpretative rule is subject to judicial review if it is a "final determination" of the legal question at issue and the agency has "rendered its last word on the matter" "[s]hort of an enforcement action." *Id.* This is consistent with the Act, under which judicial review is accorded an interpretative rule that is not "preliminary, procedural, or intermediate" because it is a "final agency action" for which "there is no other adequate remedy in a court." 5 U.S.C. § 704.

Justice Stevens in his dissent offered a more fulsome discussion of the reviewability of agency interpretative rules. *PPG Industries*, 446 U.S. at 603–04 (Stevens, J. dissenting). As Justice Stevens

noted, the Court of Appeals for the District of Columbia Circuit had already held that formal interpretative rules qualify as reviewable final agency action. *Id.* at 604 n.4 (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971)). In that 1971 case, Judge Leventhal examined the text of the Act and found Section 10 authorizes "judicial review of 'final agency action,'" "the term 'agency action' includes 'rule,' and that in turn is defined as 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,'" and "[t]he term 'agency action' thus embraces an agency's interpretation of its law." *Nat'l Automatic Laundry & Cleaning* Council, 443 F.2d at 698.[11] The Court in *PPG Industries* reached the same result nine years later.

The Court's holding in *PPG Industries* is entitled to the utmost respect because nothing suggests that the issue was wrongly decided.

C. Judicial review of interpretative rules is not unduly disruptive.

History does not support the government's claims that judicial review of interpretative rules is unduly disruptive. The Court's 1980 *PPG Industries* decision and the earlier Court of Appeals decision reaching

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11. Judge Leventhal further observed the Court had ruled the year before that "finality is not negatived because the agency's determination concerning the application of its statute [is] lacking in 'independent coercive effect.'" *Id.* (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

the same result did not produce an unending flood of litigation or otherwise prove disruptive to agency use of interpretative rules. Rather, judicial review of interpretative rules has proved to be a workable method of resolving important legal questions. *See, e.g., Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir. 1976) (affirming successful challenge to interpretative rule regarding whether ATMs established by national banks are "branches" under Section 36(f) of the National Bank Act); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1564–66 (D.C. Cir. 1984) (en banc) (reviewing interpretative rule).

At a minimum, the government has not identified any "special justification" sufficient to surmount the considerable *stare decisis* barrier to the position that the government now advances. The government's brief neither discusses nor even cites *PPG Industries*.[12] While the government today asserts that a regulated entity's disagreement with an agency is insufficient to "justify judicial review," the government argued to the contrary in *PPG Industries* and the Court agreed. Pet. Br at 24. The Court should adhere to its prior decision and decline the unsupported invitation to depart in this case from the result in *PPG Industries*.

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12. The government does cite Judge Leventhal's 1971 decision for the propositions that issuance of interpretative rules is a "salutary administrative practice" and that the availability of judicial review "might well discourage the practice," but the government does not address the court's holding that judicial review of interpretative rules is expressly authorized and cannot be denied even though an agency's interpretation of its law lacks independent coercive effect. Pet. Br. at 23–24 (quoting *Nat'l Automatic Laundry*, 443 F.2d at 699).

III. The *Bennett* decision did not overrule the Court's decision in *PPG Industries* and did not render interpretative rules immune from judicial review.

Given the text of the Act and the Court's decision in *PPG Industries*, the government's case turns on whether the Court in *Bennett v. Spear* reversed its prior decision in *PPG Industries* and erected a nontextual exemption of interpretative rules from judicial review in the Administrative Procedure Act. Pet. Br. at 25 (quoting *Bennett v. Spear*, 520 U.S. 154, 177 (1997)). The government's argument misreads the *Bennett* decision and ignores the Court's subsequent rebuke of the very argument advanced here in the *American Trucking* decision and clarification in the *Sackett* decision that the "prongs" outlined in *Bennett* are merely "hallmarks of finality," not requirements that limit the availability of judicial review.

A. *The* Bennett *decision merely distinguished* Franklin *and* Dalton *without imposing a universal test for final actions.*

In the portion of the *Bennett* decision that the government relies on to gut the Act's judicial review provision, the Court merely dispensed with the government's "theory" in that case relying on *Franklin* and *Dalton* that a biological opinion issued by the Fish and Wildlife Service to another agency is not "reviewable 'final agency action'" because it is "an agency's recommendation to another governmental decisionmaker.'" Brief for Respondents at 25, *Bennett v. Spear*, 520 U.S. 154 (1997) (No. 95-813) (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994)). The Court

distinguished these two cases because they involved reports to the President "which were purely advisory and in no way affected the legal rights of the relevant actors," as compared to the eventual action taken by the President that would affect legal rights. *Bennett*, 520 U.S. at 178. In other words, the reports were "preliminary" and "intermediate" rather than "final." 5 U.S.C. § 704.

In the course of rejecting the government's claim that *Franklin* and *Dalton* foreclosed judicial review, the Court observed: "[a]s a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett*, 520 U.S. at 177. In describing the latter of the two "general" conditions, the Court stated that an "action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Marine Terminal*, 400 U.S. at 71).

The government argues that this small portion of the Court's *Bennett* decision established (or recited) an absolute and universal requirement for judicial review that would preclude review of all interpretative rules. This mischaracterizes the Court's discussion in *Bennett*.

The *Bennett* discussion merely notes that in many contexts, agency actions are generally "preliminary" and "intermediate" until the point at which "rights or obligations have been determined" or the point at which "legal consequences will flow." 5 U.S.C. § 704; *Bennett*, 520 U.S. at 178 (quotation omitted). This general guidepost was helpful to resolve the issue in *Bennett*, but its application in one relevant context did not silently overturn *PPG Industries* and foreclose direct judicial review of agency interpretative rules, as the government suggests.

The assertion that *Bennett* imposed (or recited) a sweeping limit on the scope of "final agency action" that forecloses review of interpretative rules is belied by the Court's unequivocal recognition in *Bennett* that the Act "by its terms provides a right to judicial review of *all* 'final agency action for which there is no other adequate remedy in a court,' and *applies universally* 'except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law.'" *Bennett*, 520 U.S. at 175 (citing 5 U.S.C. § 704; 5 U.S.C. § 701(a)) (emphasis added). It would be surprising indeed if a few pages later the Court announced in dicta that the Court would depart from *PPG Industries* and deny judicial review of interpretative rules without even discussing it first. The Court's decision included no such announcement, and even if it had that would not be a reason now to take the dramatic step the government claims the Court said it would.

B. The American Trucking *decision already rejected the government's attempt to rely on* Bennett *to foreclose judicial review of interpretative rules.*

The government's expansive view of *Bennett* has already been rejected by this Court.

In *American Trucking*, the government argued an interpretative rule announced in the explanatory preamble to a final rule "d[id] not satisfy the second *Bennett* requirement that 'the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Brief for Petitioners at 40–41, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) (No. 99-1257) (quoting *Bennett*, 520 U.S. at 178). In an opinion for

the Court by the author of *Bennett*, the Court refused to apply *Bennett* to foreclose judicial review of classes of agency action that by definition do not determine rights or obligations or have direct legal consequences.

At issue was EPA's statement interpreting the provisions of Part D of Title I of the Clean Air Act regarding whether a set of specific restrictions in Subpart 2 would govern the implementation of a new ozone standard. The statement was unquestionably an interpretative rule "issued by [EPA] to advise the public of [EPA's] construction of the [Clean Air Act] which it administers." *Mortgage Bankers*, 135 S. Ct. at 1204.

The Court had "little trouble concluding" that this interpretative rule "constitute[d] final agency action." *Am. Trucking*, 531 U.S. at 478. The Court explained the word "action" in Administrative Procedure Act "is meant to cover comprehensively every manner in which an agency may exercise its power" and so the limit on judicial review is contained "in the word 'final,' which requires that the action under review 'mark the consummation of the agency's decision-making process'" and "[o]nly if the '[agency] has rendered its last word on the matter' in question is its action 'final' and thus reviewable." *Id.* (quoting *Bennett*, 520 U.S. at 177–78; *PPG Industries*, 446 U.S. at 586). The Court found "[t]hat standard" for final agency action was "satisified" by the agency's "adopt[ion] of [an] interpretation" of a statute. *Id.* at 478–79. Thus, the Court held the interpretative rule issued by EPA was final agency action even though the government had shown that "[a]ny obligations ar[o]se regardless of what EPA said, or did not say," "[n]o legal consequences flow[ed] from the statements themselves," and "EPA's views

w[ould] produce tangible legal consequences only when EPA t[ook] actual steps" consistent with EPA's interpretation of the statutue. Brief for Petititioners at 41, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) (No. 99-1257).

And so, the Court in *American Trucking* rebuffed the government's first attempt to argue that the *Bennett* decision imposed a "requirement that 'the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."'" *Id.* at 40–41 (quoting *Bennett*, 520 U.S. at 178). The government notably does not discuss or cite *American Trucking* in its brief raising the same argument.

C. *The* Sackett *decision clarified that the* Bennett *decision outlines "hallmarks" of finality, not requirements for final actions.*

While the decision in *American Trucking* shows that the government's argument based on *Bennett* is erroneous, the Court's opinion by the same author in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), helpfully clarifies that the "prong" on which the government relies is not a universal requirement.

In *Sackett*, the government argued that an EPA compliance order was not a "final agency action" in part because it did not have a sufficient legal effect. In rejecting that claim, the Court disagreed but first clarified that independent legal effects are merely "hallmarks of APA finality." *Sackett*, 132 S. Ct. at 1371. Thus, the decision in *Sackett* explained that the discussion in *Bennett* was merely a recitation of helpful benchmarks, nothing more.

* * *

In this case, the government's third attempt to use *Bennett* to severely restrict the role of courts in reviewing agency actions, a final and definitive rebuke is warranted.

IV. A decision immunizing interpretative rules from judicial review would permit regulation by administrative fiat.

Judicial review of interpretative rules serves a vital role in administrative law by discouraging agencies "whose zeal might otherwise have carried them to excesses" from leveraging the costs, length, and uncertainty of enforcement actions and the deference that they are afforded by the judiciary to coerce regulated entities into compliance with burdensome agency demands "not contemplated in legislation creating their offices." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). The check of direct judicial review is especially necessary for interpretative rules that are exempt from the Act's procedural protections requiring notice and comment rule making.

Accepting the government's position here would fly in the face of the Court's assurance last term in *Mortgage Bankers* that "regulated entities are not without recourse" from unlawful, arbitrary, and capricious interpretative rules. *Mortgage Bankers*, 135 S. Ct. at 1209. Judicial review is the sole recourse available for interpretative rules. Congress could not have intended to leave those aggrieved by agency interpretative rules without any recourse when these final agency actions have significant coercive effects. The public would often have no real choice but to comply with an agency's publicly expressed view of the law no matter how erroneous or unreasonable if interpretative rules are immune from judicial review because the alternative course of acting contrary to the announced agency view risks the considerable weight of agency enforcement.

The government claims that interpretative rules "are not easily used to 'strong-arm[]' regulated parties" because they "do not direct the recipient to take or refrain from taking any action." Pet. Br. at 44 (quoting *Sackett*, 132 S. Ct. at 1374). But as the Court has recognized, "[t]he absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules," *Mortgage Bankers*, 135 S. Ct. at 1204, and there is little if any difference in the coerciveness of an agency statement that certain conduct *is* unlawful and an agency statement demanding that the same conduct must stop *because* it is unlawful.

The government also claims interpretative rules "are not easily used to 'strong-arm[]' regulated parties" because they "they are typically provided only to persons who request them." Pet. Br. at 44 (quoting *Sackett*, 132 S. Ct. at 1374). But agencies can and do issue interpretative rules *sua sponte*, and they should be expected to do so far more often if the Court in this case reverses *PPG Industries* and immunizes interpretative rules from judicial review.

As the *PPG Industries* decision illustrates, there are already circumstances in which agencies issue interpretative rules on their own accord addressing capital projects that are already underway. Without the ability to obtain judicial review, agencies will be empowered to coerce investments in compliance with aggressive and potentially unfounded interpretations of statutes and regulations. For large capital projects the *in terrorum* effect of an interpretative ruling can kill off a project entirely by imposing unacceptable costs or risks, or discouraging key financial backers.

And in other cases, an agency interpretative rule can force acceptance of large changes in overall costs and design to meet the demands of an agency's interpretation that would not survive judicial review.

There is every reason to believe that immunizing interpretative rules from judicial review would lead to "strong-arming of regulated parties." *Sackett*, 132 S. Ct. at 1374. While agencies might voluntarily restrain themselves from using such a power to achieve regulatory ends not intended by Congress without meaningful judicial review, the Act entrusts the judiciary with the role of tempering those who in their zeal would disregard such voluntary restraints. Congress could not have intended to eliminate this vital protection by merely requiring that an agency action must be "final" for judicial review rather than "preliminary, procedural, or intermediate."[13]

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13. S. REP. NO. 79-752, at 26 (1945) ("Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.").

V. The government's brief wrongly suggests the Corps will stop providing jurisdictional determinations as if the agency can ignore petitions requesting interpretative rules, contrary to the requirements of the Administrative Procedure Act.

The Corps intimates that "because nothing in the [Clean Water] Act or the Corps' regulations requires the Corps to issue jurisdictional determinations, the Corps might reconsider the practice" if the Court were to affirm the right to judicial review. This is an empty threat. The Corps cannot decide to categorically ignore petitions from landowners requesting jurisdictional determinations to avoid the burden of judicial review. Pet. Br. at 24. To the contrary, the consideration and disposition of petitions from landowners requesting jurisdictional determinations are both required and governed by the provisions of the Administrative Procedure Act.

The Clean Water Act does not have to "establish" a "mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites," Pet Br. at 3, because that mechanism is generally provided by Congress in the Administrative Procedure Act. The Act dictates that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" and that this extends to a rule that is a "statement of particular applicability and future effect designed to interpret law." 5 U.S.C. § 553(e); 5 U.S.C. § 551(4). Thus, the Corps "shall give" a landowner "the right to petition for the

issuance of" a "statement" determining "whether the Act applies to particular sites."

The Corps cannot categorically ignore petitions requesting interpretative rules, for denial of such a petition requires "[p]rompt notice of the denial" and must be "accompanied by a brief statement of the grounds for denial." § 555(e). A blanket prospective denial of petitions would contravene this provision.

The consideration and disposition of a landowner petition requesting a jurisdictional determination is not "committed to agency discretion by law," § 701(a)(2), and so it may not be "unreasonably delayed," § 706(1), and a decision to deny a petition must be vacated by a reviewing court if it is "arbitrary, capricious, [or] an abuse of discretion." § 706(2)(A).

Announcing to the public that all future petitions for jurisdictional determinations will be ignored or denied without reasonable consideration would violate the Administrative Procedure Act. Accordingly, there is no real danger that the Court's decision in this case would cause the Corps to "reconsider the practice" of reasonably considering and disposing of petitions requesting jurisdictional determinations.

Agencies have been making interpretative rules under threat of judicial review for many decades. Undoubtedly agencies prefer to operate without the oversight of the courts and, therefore, it is not surprising that the government is making a third attempt to avoid judicial review. Nor should it be surprising, however, for the Court to reaffirm the essential role of judicial review for final agency actions interpreting how the law applies to those affected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO, INC., et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF ERNEST M. PARK AND LAUREN KENT PARK IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is a Jurisdictional Determination that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties subject to judicial review under the Administrative Procedure Act?

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

Ernest M. Park is a natural person and has no ownership interest in any party.

Lauren Kent Park is a natural person and has no ownership interest in any party.

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INTEREST OF *AMICI CURIAE*[1]

Ernest M. Park and Lauren Kent Park are residents of the State of Connecticut. They own property in Fairfield County, Connecticut which is zoned for residential use. Mr. and Mrs. Park have spent their life savings to purchase the property. The property was unimproved when purchased, except for an abandoned gravel driveway.

The Parks have spent tens of thousands of dollars and several years to obtain all required local and state approvals to improve their property and build a house thereon. After they had obtained the local and state approvals and had begun work to improve a preexisting gravel driveway leading from the public roadway to the site of their ;proposed house on the property, the United States Army Corps of Engineers ("USACE" or "Corps") asserted that it had regulatory jurisdiction because the property contained a regulated wetlands. The Corps demanded that the Parks halt work and obtain one or more federal permits.

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[1] The parties have consented to the filing of *amicus* briefs in support of either of either party and such consents are on file with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The Parks then spent three additional years and additional tens of thousands of dollars challenging the Corps district engineer's jurisdictional determination ("JD"), only to have the JD affirmed by the Corps' regional office.

In addition, the Parks have paid, and will continue to have to pay, thousands of dollars of state and local real property taxes each year on their property which has been rendered useless because of Corps's threats to impose harsh and burdensome fines and penalties if they improve the driveway and the property without obtaining federal permits.

The Parks wish to challenge the JD in federal court, but if the Court reverses the Eighth Circuit's decision in this case, the Parks will be unable to afford the additional hundreds of thousands of dollars and approximately two years to pursue the federal permitting process before they can obtain review by an impartial Article III court.

INTRODUCTORY STATEMENT

The Clean Water Act ("CWA") authorizes the Corps of Engineers to regulate certain discharges to "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a) & 1362(7). The term "navigable waters" has been defined by the Corps in different ways over time. This Court defined the term in *Rapanos v. United States*, 547 U.S. 715 (2006). The plurality defined "navigable waters" as Traditional Navigable Waters (capable of use in interstate commerce) ("TNW") and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to Traditional Navigable Waters. *Id.* at 739-42. In a concurring opinion, Justice Kennedy said that the CWA covered wetlands with a significant physical, biological, and chemical impact on Traditional Navigable Waters. *Id.* at 779.

The "reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified as wetlands covered by the Act " *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring), and since 1972, when the Act came into effect, "[t]he Corps has [] asserted jurisdiction over virtually any parcel of land containing a channel or conduit – whether man-made or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow " *Rapanos*, 547 U.S. at 722. This implicates "the entire land area

of the United States." *Id.* "Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id.*"[2]

By regulation, Corps' district engineers are authorized to determine the applicability of the Clean Water Act "to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6). A formal Approved Jurisdictional Determination ("JD") provides a delineation of wetlands or other waters subject to regulation under the Clean Water Act, along with detailed physical, chemical, based on site specific biological and other data. 33 C.F.R. § 331.2. A determination pursuant to this authorization shall, in the words of the regulation itself "constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6).[3]

A Jurisdictional Determination requires property owners to: seek a permit, proceed with use of the land without a permit, risking civil and

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[2] In an earlier decision, the Eighth Circuit had held that the Corps can establish federal jurisdiction over wetlands under either the plurality's "continuous surface water" test or Justice Kennedy's "significant nexus" test. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

[3] It is noteworthy that the Corps' regulations also provide for Preliminary JD's that indicate that there may be "waters of the United States" on a parcel. 33 C.F.R. § 331.2, and characterize these preliminary JD's as "advisory in nature" and that they "may not be appealed." Pet. Opening Brief at 25(a).

criminal penalties, or abandon use of the regulated portion of the land; ruinous fines. *See* Pet. Opening Brief at 9 n.4.

Corps regulations authorize an administrative appeal of an "approved judicial determination." The procedure for such an appeal is the same as that for an appeal of a denial of a permit.[4]

In 2004 *amici* purchased an eight (8) acre wooded building lot plus a six (6) acre parcel that was a "conservation easement"[5] in Weston, CT for approximately $212,000. The building lot is zoned for single family residential use. *Amici* planned to purchase and install a modest modular home on the property, at a cost of $285,000, including site preparation, foundation, customization, and septic system.

Over a three year period *amici* applied for local permits to repair a pre-existing gravel driveway[6]

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[4] *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331.").

[5] The easement had been demanded by the town conservation commission from a prior owner.

[6] The driveway had been built in the mid 1980s by a previous owner of the property. It is approximately 1,300 feet (one quarter mile) long, and runs from a cul de sac that

(continued...)

and underground utilities on the property (17 times in total). They hired multiple engineering firms and law firms, did test borings and other work required by town authorities and satisfied the concerns of the town conservation commission. In January 2007 the Parks received a permit from the town to repair the existing driveway so that delivery vehicles and construction equipment could reach the location in the interior of their lot where they wanted to build their home.

Amici spent approximately $205,000 in consultant and legal fees, plus an additional $33,000 for sanitation permits and underground pipes the town conservation commission required them to install for drainage and to enable turtles to cross under the driveway. In total, they spent at least $240,000 – more than they had paid for the land itself – for permits and preliminary work demanded by the state conservation commission,

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[6](...continued)
is a public street to an elevated knoll on the property on which the *amici* planned to build the house. Vegetation had been cleared to put the driveway in, but it had grown back and the driveway had fallen into disrepair. The driveway needed to be upgraded to permit it to be used by heavy vehicles needed to transport the house modules to the place the house was to be built. In the 1800s there had been an old "corduroy" road at the same location; that road had been used to transport trees, logs and timber that was harvested from the forest on the property.

even before the Corps got involved.[7] *Amici* made preparations to repair the driveway, including purchasing gravel and drainage pipes and retaining a contractor.

But in late September 2008, after they had started work on the driveway and had put down a substantial amount of base material, as the town had authorized (and just weeks before completion of the driveway repair), the Corps sent a cease and desist letter, threatening the daily fines and imprisonment if *amici* took any further steps to prepare the site of the house or repair the gravel driveway.[8] *Amici* sent a reply asserting that the Corps has no jurisdiction, but stopped work rather than risk ruinous penalties.[9]

In discussion with Corps' officials it became apparent that the agency believed, incorrectly, that the property was directly adjacent to a river; in fact the river is about 60 miles from the property. *Amici* described the location of the property and the river and submitted a letter from

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[7] In addition to these direct costs of obtaining approvals, the Parks have paid approximately $60,000 in real estate taxes on the property since purchasing it.

[8] The Corps stopped the Parks from installing the pipes after having initially told them orally that the Corps had no issue with installation of the pipes. The Corps also stopped *amici* from excavating foundation of the house.

[9] The 36-inch diameter pipes are still lying on the property, deteriorating.

their engineer stating that the property has no connection whatsoever to any navigable waterway.

From December 2008 to March 2010 *amici* tried to arrange an on-site meeting with the Corps; meetings were scheduled and cancelled several times, mainly due to frequent changes in personnel at the Corps' district office.

In June 2010 a Corps project manager finally came to the site and walked the property, the neighboring properties and beyond. Weeks later the Corps' project manager proposed that *amici* apply for an "after the fact" permit, and agree to "mitigation" measures.

In August 2010, *amici* asked the Corps' project manager to explain how isolated "wetlands" on their property have any relation to "navigable waters" or interstate commerce. The response was an email threatening to refer the case to the Environmental Protection Agency ("EPA") if *amici* did not respond in writing regarding "unauthorized" activity on the property. *Amici* responded by sending the Corps' their full engineering report that showed that any "wetlands" on the property had no connection to interstate or navigable waters.

It was not until mid-August 2012, more than two years after she had seen the property first hand, that the Corps' project manager replied that she was in the process of completing a formal Jurisdictional Determination ("JD"). In fact it was not until a month later, more than *five years* after

amici had obtained town approvals, and *four years* after the Corps' initial "cease and desist" letter, that *amici* received a letter from the Corps stating the Corps' district office had determined the "wetlands" on the property are "jurisdictional" and reiterating that *amici* were in violation of Corps regulations.

By early December 2012 *amici* had still not received a copy of the final JD, and they again requested it, along with all information used in developing the Corps' final determination, including data, maps, photographs, and other documentation the Corps. A month later, on January 10, 2013, *amici* received the JD and a "tolling agreement."

On April 18, 2013 *amici* submitted their appeal of the JD to the Corps' "Regulatory Appeals Review Officer." A few weeks later they met with the Review Officer, the Corps' Project Manager and a Corps' Senior Soil and Wetland Scientist at the property. The Review Officer later upheld the District's Jurisdictional Determination.

Amici then appealed the Review Officer's decision to the North Atlantic Division of the Corps. It was not until January 2014 that they received an "Administrative Appeal Decision" upholding the District Engineer's "approved jurisdictional determination." The cover letter from Commanding General of the Corps' North Atlantic Division stated "*My decision on your request for appeal concludes the administrative appeal process*. However, this does not preclude

you from filing a permit application for any work you propose in the jurisdictional areas." (Emphasis supplied.)

The JD process itself took almost six years, and the *amici* incurred tens of thousands of dollars in costs for engineering, hydrology and environmental experts' reports. Their out of pocket expenditures during the JD process are almost equal to the amount recited in *Rapanos* as the amount required to obtain a permit. The delays imposed on them during the JD process exceed substantially the time stated in *Rapanos* for the permit process.[10] The costs and delays *amici* have incurred in the JD process do not, of course, include the additional time and expense they would necessarily incur if they were to submit to the Corps' detailed, exhausting, time-consuming, and expensive permit process, which, according to *Rapanos*, would approximately double the costs and delays.

Amici are individuals of modest means – Mr. Park is a computer engineer and the Parks own

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[10] In addition to direct costs to *amici* of the Corps' permit process, the Parks paid approximately $163,000 to rent a house to live in for the four years after receiving local approvals and during the period the Corps was "working on" its jurisdictional determination, a cost which would have been unnecessary had they been able to build the house on the property in a reasonable time. They also paid about $30,000 in real estate taxes on the empty, but otherwise buildable, lot during that same period. They continue to incur those costs to this day.

and operate a small business that provides computer consulting services to other small and medium-sized businesses. They have expended their life savings to buy the land, obtain local permits and deal with the Corps during the JD process. Their experience with local and federal processes for accomplishing the simple goal of building their modest "dream home" has drained them of their financial resources and physical energy.

In *Rapanos*, 547 U.S. at 721, this Court noted that the wetlands permitting process under the CWA took on average more than two years and costs on average more than $271,000.[11] The *Rapanos* plurality's estimate of the burden imposed on landowners by the Corps' permitting process is, if anything, understated. In the experience of *amici*, the multi-year and several hundred thousand dollar process (including obtaining local and state permits, the JD process, followed by the permit process) imposes delay after delay and immense costs on property owners. The actual experience of *amici* illustrates the immense burdens the Jurisdictional Determination process employed by Corps imposes on landowners and the additional, and well-nigh insurmountable, barriers that would be imposed if landowners whose

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[11] As this Court noted in *Rapanos*, "[t]hese costs cannot be avoided," because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities." *Rapanos*, *id.*).

property has been deemed a jurisdictional "wetlands" had to go through the full permitting process before they could seek review by an impartial Article III court.

What is unduly burdensome for a business such as Respondent Hawkes in this case is unbearable and intolerable for the thousands of individuals whose property the CWA enforcement agencies claim to regulate, and do in fact regulate in draconian fashion.

SUMMARY OF THE ARGUMENT

The APA "'creates a presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)).

An "approved JD" changes the legal regime by determining that the property contains "waters of the United States," subject to federal control under the Clean Water Act, after a formal site-specific adjudication. Respondent concedes that an "approved" JD is the Corps' final finding as to federal jurisdiction.

The JD has practical and legal consequences for the regulatory agency – the Corps or the Environmental Protection Agency – and coercive effect on the property owner, who must either apply for and obtain an individual federal permit (at enormous cost), ignore the JD and proceed without a permit with improvements or other activity on the land and risk ruinous fines and

criminal liability, or abandon any use of the property after having spent substantial moneys, time and effort acquiring the land, having plans drawn up by architects, engineers and other professionals, and obtaining local and state permits.

Under *Bennett v. Spear*, 520 U.S. 154 (1997), this Court has generally required that an agency action have a particularized legal consequence in order to be reviewable by an Article III court. This Court has taken a practical approach in determining if the agency action changes the legal regime, or fixes a "right" or "obligation," even though the agency action does not have legal consequences independent of the underlying statute. An approved JD changes legal rights and obligations between the landowner and the federal government by determining, through a formal site-specific adjudicatory process, that a particular property contains "waters of the United States" subject to federal control under the Clean Water Act. The JD is conclusive as to federal jurisdiction. The JD has practical and legal consequences for

An approved JD has coercive effect on the property owner by compelling the owner to either apply for and obtain a permit at immense cost and after long delay (and often after agreeing to limitations on his use of the property or granting "conservation easements"), or proceed with the owner's intended use without a permit, exposing the owner to ruinous fines and criminal liability.

The requirement that a landowner submit to a separate (and largely redundant) permit process before seeking judicial review, as urged by the Corps, is duplicative and illogical. The permit process does not aid a court's review of the jurisdictional issue beyond the record already created during the exacting JD process.

There is no adequate remedy in court that justifies any further delay in judicial review. Seeking judicial review by violating the Clean Water Act to trigger an enforcement action imposes unacceptable risks and burdens on the landowner because the penalties for discharging a "pollutant" in wetlands without a permit are fines of tens of thousands of dollars a day and possible criminal liability. A process that requires an aggrieved party to risk devastating fines and imprisonment to challenge the validity of a regulation is unconstitutional and invalid on its face. See *Ex Parte Young*, 209 U.S. 123 (1908).

An approved JD should be deemed "final agency action" under the APA and subject to immediate judicial review

ARGUMENT

I.

THE EIGHTH CIRCUIT'S HOLDING THAT A JURISDICTIONAL DETERMINATION IS APPEALABLE TO AN ARTICLE III COURT ACCORDS WITH THIS COURT'S JURISPRUDENCE

The Administrative Procedure Act (APA) provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977).

a. An Approved Jurisdictional Determination is Final, Reviewable Agency Action.

Under the Administrative Procedure Act, "agency action" is final and subject to judicial review if it (1) represents the consummation of agency decision-making on the matter and (2) "must be one by which 'rights or obligations have been determined,'" or from which "legal consequences will flow " *See Bennett v. Spear*, 520 U.S. at 177-78. An agency action may be final if it determines "rights or obligations." *Sackett*, 132 S. Ct. at 1371.

Determining whether an agency action is "final" is a two part analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process" and second, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow'" *Bennett, id.* (citation omitted). The second branch of the *Bennett* test is disjunctive: the agency's action may final if it determines "rights" or "obligations," even if "legal consequences" do not flow from the action. In addition, there must be no other remedy in court other than APA review of the agency's action.

The Corps argues that its JD determination is not final agency action under *Bennett v. Spear* and that a landowner has an adequate remedy in court because the landowner can seek a permit, either be denied the permit or, if a permit is granted with conditions then decline the permit and seek redress in court for the Corps' JD decision. In other words, a landowner must go through the costly and time-consuming permit process – in addition to the already costly and time-consuming JD process – before a court can determine whether the landowner was required to go through the costly and time-consuming permit process. To state the Corps' desired process is to show how redundant and wasteful it is of all parties'

resources – the landowners', the agency's and the court's.[12]

The Revised JD satisfies the first Bennett criterion – it was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority. *See Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389-90 (5th Cir. 2014), *cert. pending* (No. 14-493); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591-93 (9th Cir. 2008). The Corps concedes as much. Pet. Opening Brief at 26.[13]

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[12] Moreover, once an Approved JD has been issued, "the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 70-71 (1970).

[13] The Corps' regulations provide that an Approved JD "constitute[s] a Corps final agency action." 33 C.F.R. § 320.1(a)(6). An Approved JD is a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site," and an Approved JD "can be relied upon by a landowner, permit applicant, or other affected party for five years." Corps Regulatory Guidance Letter No. 08-02, at 2, 5 (quotation omitted). Jurisdictional determinations and permitting decisions are discrete agency actions; a party may obtain a JD without seeking a permit, and may obtain a permit without seeking an Approved JD. *Fairbanks*, 543 F.3d at 593. *See* Pet.App. 9a.

The Eighth Circuit's decision flows from *Sackett*, in which this Court held unanimously that an assertion of federal jurisdiction, through the issuance of a compliance order, is "final" and subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704. Like the compliance order in *Sackett*, the JD in this case has immediate and direct legal consequences. It is an adjudicative decision that applies the law to the specific facts of a case and is legally binding on the agency and the landowner.

The Court of Appeals correctly found that the Corps "exaggerat[ed] the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action," such as an Approved JD. *Id.* at 11a.

b. An Approved Jurisdictional Determination Has Substantial and Direct Legal and Practical Consequences

The Corps' position that a JD is not reviewable because it has no independent coercive effect, is refuted by this Court's precedents. In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42. The order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott*

Labs. v. Gardner, 387 U.S. 136, 150 (1967). The Court nonetheless held the order was reviewable because the "determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact"; it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Frozen Food Express*, 351 U.S. at 43-44. A JD, which is a determination regarding a specific property, has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970), the Court rejected as having "the hollow ring of another era" the contention that an "order lacked finality because it had no independent effect on anyone," citing *Frozen Food Express*. *See also Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942) (regulations that alter and adversely affect appellant's contractual rights and business relations reviewable even without enforcement action).

The Corps' position that a landowner is not entitled to immediate judicial review of a JD, even though the JD is the agency's final word on the extent of federal jurisdiction with respect to the property in question, establishes a dangerous precedent. An approved JD has "an immediate and practical impact" on the property owner, profoundly affecting his rights. Further, as a practical matter, will make it impossible or

impractical for many landowners to resist unwarranted exercise of power by the regulatory agencies.

Under the Corps' approach, the landowner has three options: (1) engage in a costly, time consuming and very likely futile permitting process; (2) maintain the landowner's legal position that Corps does not have jurisdiction and proceed without a permit, risking ruinous fines and imprisonment[14]; or (3) abandon his planned use of the land and in many cases lose the property to tax liens. These are not reasonable options.

There is no certainty that the permit will be granted, or, if granted, would not be conditioned on impracticable or burdensome restrictions or "mitigation," including "voluntary" conservation easements or even "donation" of part of the property to conservation trusts. These monetary and other expenditures by the property owner

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[14] Unless exempt, discharge of a pollutant into jurisdictional waters is prohibited without a federal permit. *See* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). Failure to obtain a permit for such a discharge exposes the person responsible to severe penalties: a party who discharges dredged or fill material into "navigable waters" without obtaining a permit is subject to civil penalty of up to $50,000 per day (adjusted for inflation) and imprisonment for not more than one year for negligent violations, 33 U.S.C. § 1319(b), and criminal penalties of up to double the fine and imprisonment for up to three years, for knowing violations, *see* Pet.App. 6a; 33 U.S.C. § 1319; *see also*, *Sackett*, 132 S. Ct. at 1370.

would be unnecessary if a court ultimately were to overrule the Corps' assertion of jurisdiction.

The Corps's argument that an approved JD is merely advisory ignores that "in reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. An approved JD has that "powerful coercive effect" because, once it is issued, the landowner faces substantial legal and practical burdens. As noted above, the landowner's only options are to: (1) complete the permit process at immense cost and great delay, with no certainty of success[15]; (2) abandon her planned use of the property; or (3) proceed without a permit and incur severe civil and criminal liability.

A JD causes an immediate, unavoidable, and substantial deprivation of constitutionally protected property interests. Is not "abstract, theoretical, or academic," *Frozen Food Express*, 351 U.S. at 43-44 (1956) because it requires a

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[15] An approved JD entails a costly and extensive onsite investigation by the Corps and "[s]ignificant agency resources are necessary to perform the scientific and technical analysis required." Pet. Opening Brief at 24. Of course, if the Corps applies technical expertise, the landowner must do likewise if he is to dispute the findings of the agency's experts. "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." Pet. App. at 20a-21a (Kelly, J., concurring). *Amici* know this firsthand, having retained experts in a number of technical disciplines, at great expense, at the JD stage.

landowner to change her plans and conduct and has immediate economic and legal consequences. It compels the landowner to submit to an agency that exercises the discretion of an enlightened despot." *Rapanos*, 547 U.S. 715, 721 (Plurality opinion. Internal citations omitted.).

A JD is an adjudicative determination that requires a property owner to obtain a federal permit if he wishes to improve or modify his land.[16]

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[16] The Clean Water Act § 404(a), from which the Corps derives its permitting authority, provides "[t]he Secretary may issue permits. for the discharge of dredged or fill materials into the navigable waters at specified disposal sites." CWA § 502(7), 33 U.S.C. § 1362(7) defines the term "navigable waters" as "the waters of the United States, including the territorial seas." EPA and the Corps have defined "waters of the United States" in various ways, often quite expansively. This Court has rejected the agencies' broad definitions and has criticized the government for overreaching and abusing its power under the CWA. *See Rapanos v. United States*, 547 U.S. 715 (2006) (plurality holding that the agency's expansive interpretation of the CWA is overly broad and creates federalism problems.); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (regulation of remote ponds exceeds statutory authority and raises constitutional questions.); and *Sackett*, 132 S. Ct. at 1375 (the "reach of the Clean Water Act is notoriously unclear" and that the regulators deem that "any piece of land that is wet at least part of the year" may be covered by the Act, "putting property owners at the agency's mercy." Alito, J. concurring.)

In *Rapanos*, the plurality defined "navigable waters" as

(continued...)

Simply depositing a bucket of gravel on a driveway

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[16](...continued)
traditional navigable waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to traditional navigable waters. 547 U.S. 715, 739-42. Justice Kennedy, in a concurring opinion took the position that the CWA covered wetlands with a "significant" physical, biological, and chemical connection to a traditional navigable water. *Id.* at 779. In practice, the EPA and the Corps assert broad federal jurisdiction over wetlands under either the *Rapanos* plurality's "continuous surface water" test or Justice Kennedy's "significant nexus" test. *See Definition of "Waters of the United States' Under the Clean Water Act,"* Proposed Rule, 79 Fed. Reg. 22188 (Apr. 21, 2014). The Corps and the EPA assert regulatory authority over much land in the United States through an expansive definition of jurisdictional waters, which they claim includes tributaries, ditches, ponds, ephemeral streams, drains, wetlands, riparian areas and "other waters." *See* Proposed Rule, 79 Fed. Reg. at 22262-63 (Apr. 21, 2014). This rule is being challenged in a number of cases. We have argued that the agencies' concept of their wetlands jurisdiction is overbroad.

The Corps has "deliberately left vague" the "definitions used to make jurisdictional determinations," giving District offices great latitude in defining "waters of the United States" on a case-by-case basis. *Rapanos*, 547 U.S. at 727-28.

Because of the agencies' proclivity to overreach in asserting jurisdiction, it is essential that a landowner have practical and prompt access to an independent, impartial court in which the landowner can preserve and protect his property rights by challenging the government's erroneous assertion of jurisdiction.

in a wetland areas without a permit is a violation. In effect, property owners are excluded from the regulated areas, just as *amici* herein have been excluded from completing repairs on an existing driveway or building their house for more than seven years to date.

The costs and delays inherent in the permit application process are prohibitive, *see Rapanos*, 547 U.S. 715, 721 (2006) (plurality opinion), and often will prevent the landowner from vindicating her property rights. If a property owner then has to sue to have her objections heard by a court, and the court ruled that the Corps' JD was factually incorrect or beyond its jurisdiction, the landowner will have been irreparably harmed.[17],[18]

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[17] As Justice Scalia recognized in *Thunder Basin Coal Co. v. Raich*, 510 U.S. 200, 220-21 (1994)(concurring in part and concurring in the judgment), "[C]omplying with a regulation later held to be invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."

[18] In *Ex Parte Young*, 209 U.S. 123, 148 (1908) the Court held that requiring a party to bear "the burden of obtaining a judicial decision of such a question upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would be unconstitutional because it would effectively "close up all approaches to the courts." More recently, this Court ruled in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) that "Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative

(continued...)

The requirement that a landowner endure a lengthy and expensive permit process in order to obtain impartial review by an Article III court renders the right to such review ephemeral for many property owners, especially individuals and small businesses. As a practical matter, only those who can afford to see the permit process through and bear the subsequent cost and delay of litigation – which can easily amount to hundreds of thousands of dollars and several years – with no prospect of recovering the substantial costs of that course of action – can ever be vindicated in court.[19]

The mere requirement that the landowner pursue the permit process to the end forces that owner to concede, at least for a substantial time, that the Corps has jurisdiction – the very issue in dispute. The process gives the agency overwhelming leverage to wrest "voluntary"

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[18](...continued)
action." *See also Thunder Basin*, 510 U.S. at 216, where this Court concluded that lack of judicial review is unconstitutional where "the practical effect of coercive penalties for noncompliance is to foreclose all access to the courts," and where "compliance is sufficiently onerous and coercive penalties sufficiently potent." These are precisely the risks and burdens imposed on a landowners who wishes to obtain judicial review of an approved JD.

[19] A JD limits uses of the property, undermines the owners' intended use of the property, increases costs and reduces the value of the property or makes it unmarketable. These burdens can effectively deprive the landowner of viable economic use of the property.

concessions from the landowner in the form of limitations on the owner's development rights or even transfer of a part of the acreage to a private "conservation" group that has gained favor with the agency.

Once the owner has been persuaded to "voluntarily" give up his rights in order to obtain a permit, it is no stretch to imagine that a court would find that the owner had suffered no injury at the hands of the agency, and thus the delayed right to a judicial determination of jurisdiction becomes nugatory.

Lack of immediate judicial review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

This Court's decision in *Sackett* reflects a concern that failing to permit immediate judicial review of CWA jurisdictional determinations would leave regulated parties unable, as a practical matter, to challenge those assertions. In *Sackett*, this Court held that a similar intolerable choice between surrendering development rights, knuckling under to the agency's demands, or risking massive civil and criminal penalties violates the due process requirements of the constitution.

The dilemma posed in this case of the right to contest jurisdictional determinations is no different, and affects tens of thousands of individual and small business property owners throughout the nation. The question presented by the petition for certiorari should be decided by this Court.

CONCLUSION

A proper analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review.

For the foregoing reasons, *amici curiae* urge the Court to affirm the judgment of the Court of Appeals for the Eighth Circuit.

March 2, 2016

Respectfully submitted,

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No. 15-290

In The
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES COMPANY, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

This case is of particular interest to SLF because the Army Corps of Engineers' (Army Corps) assertion that courts are precluded from reviewing its final Jurisdictional Determinations is a prime example of the Executive Branch's unconstitutional usurpation of power through creation of an expansive administrative state. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the expansion of existing agencies' jurisdiction. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

prime concern because expansion of administrative jurisdiction raises serious constitutional concerns.

The Army Corps issues nearly 10,000 Jurisdictional Determinations a year and in doing so, unilaterally declares that innumerable acres of private property fall within its jurisdiction. Ignoring the presumption of reviewability and basic separation of powers principles, the Army Corps claims that the judiciary has no power to review its Jurisdictional Determinations. *Amicus* writes separately to stress that the Army Corps' disregard for the Constitution and the intent of Congress must be stopped.

SUMMARY OF ARGUMENT

"The availability of judicial review, is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally void." Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (Little, Brown, 1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *United States v. Nourse*, 9 Pet. 8, 28-29 (1835)). Congress codified the presumption of reviewability when it enacted the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*. In designing the APA, Congress expressly provided judicial review of final agency action, 5 U.S.C. § 704, which is exactly

what the Jurisdictional Determination in this case is. *Alaska Dept. of Env. Conservation v. EPA*, 540 U.S. 461 (2004).

"The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012). Unless an administrative agency can establish that Congress intended to preclude judicial review, courts have the power to review challenges like the one presented in this case. The Army Corps issues nearly 10,000 Jurisdictional Determinations a year, unilaterally declaring that nearly any piece of property that is wet at least part of the year falls within its regulatory jurisdiction. Through Jurisdictional Determinations the Army Corps, and invariably the Environmental Protection Agency (EPA), expands its reach far beyond what Congress ever intended when it enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*.

Even more egregious than its unilateral assertion of jurisdiction though, is the Army Corps claim that courts lack the power to review Jurisdictional Determinations. The Framers of the Constitution sought to create a government structure limited in nature. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1988). "In a government, where liberties of the people are to be preserved , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check

upon each other." Charles Pinckney, Observations of the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966).

The strong presumption of reviewability supports judicial review of Jurisdictional Determinations, as does basic separation of powers principles.

ARGUMENT

I. A strong presumption of reviewability supports judicial review of Jurisdictional Determinations.

A. Judicial review of Jurisdictional Determinations is presumed.

1. This Court's precedent antedating the APA supports judicial review of executive action. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall declared: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Id.* at 163. Inherent in the constitutionally protected right to claim protection of the laws is a strong presumption of judicial review. *See Bowen*, 476 U.S. at 670 (citing *Nourse*, 9 Pet. at 28-29).

Throughout history, the Court has emphasized the need for the judiciary to review executive actions. And, despite a period of judicial restraint that resulted

only out of deference to Congress, by the early 20th century, any perceived barriers to judicial review faded away. *See Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (explaining that the acts of all administrative agency "officers must be justified by some law, and in the case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). The increased level of executive actions and the already growing administrative state underscored the need for judicial review. In 1915, the Court reaffirmed the common law presumption of reviewability when it reviewed the Acting Commissioner of Immigration's detention of a group of aliens for the purpose of deportation even though the statute at issue did not provide for judicial review. *Geigow v. Uhl*, 239 U.S. 3, 8 (1915). Writing for the Court, Justice Oliver Wendall Holmes explained that judicial review was appropriate because the statute did not forbid courts from considering whether the Commissioner's act violated the statute. *Id.* at 9. In doing so, Justice Holmes made clear that under the common law, unless a statute forbids judicial review, the courts have both the power *and* duty to review challenged executive actions.

Over the next few decades, the Court continued to stress the need for judicial review of administrative actions. By way of example, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Court reviewed the actions of the Secretary of Interior taken under a homestead law. In doing so, the Court found judicial review of administrative acts both appropriate and necessary,

explaining that to find otherwise would "limit[ ] the powers of the court" and "be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties." *Id.* at 182. And, in *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), the Court reviewed the Secretary of Labor's imposition of fines against steamship companies for bringing aliens with illnesses into the United States. The Court explained that it had the power to review the administrative action because even though "Congress confer[red] on the Secretary great power, it is not wholly uncontrolled." *Id.* at 339.

In 1944, the "powers of the court" to review executive actions that the Court so often spoke about received their greatest affirmation and explanation. In *Stark v. Wickard*, 321 U.S. 288 (1944), the Court explained that the presumption of reviewability arises from Article III of the United States Constitution because "[t]he responsibility of determining the limits of statutory grants of authority is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.* at 310. The Court continued: "Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id.* Starting with the presumption of reviewability inherent in the Constitution, the Court reviewed the statute governing the

Secretary of Agriculture's actions and, finding it silent as to judicial review, explained that "the silence of Congress as to judicial review is not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id.* at 309.

2. In 1946, Congress enacted the Administrative Procedure Act and codified "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). When determining whether administrative action like the Jurisdictional Determination is subject to judicial review, the Court demands that the APA's "generous review provisions be given a hospitable interpretation." *Id.* at 141 (internal quotations omitted). Both the Court and Congress have emphasized that "'very rarely do statutes withhold judicial review[]'" because to do so would convert statutes into "blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

B. Congress did not preclude judicial review of Jurisdictional Determinations.

This Court's precedent establishes "that judicial review of a final agency action by an aggrieved person

will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen*, 476 U.S. at 670 (quoting *Abbott Labs*, 387 U.S. at 140). "Statutory preclusion of judicial review must be demonstrated clearly and convincingly." *Nat'l Labor Relations Bd. v. Union Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987). Although this Court does not apply the "clear and convincing standard" in a strictly evidentiary sense, "the standard serves as 'a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Bowen*, 476 U.S. at 672 n.3 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984)).

Various considerations inform the Court's analysis of whether Congress intended to foreclose a given avenue of judicial review, including the nature of the administrative action, and the statute's language, structure, objectives and legislative history. *See Block*, 467 U.S. at 349; *see also Bowen*, 476 U.S. at 673. The leading consideration in determining whether Congress precluded judicial review is whether a party can obtain meaningful judicial review of the agency action at issue if review under the APA is precluded. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

1. Congress did not intend to preclude judicial review of Jurisdictional Determinations.

The text of the Clean Water Act contains no provision that explicitly prohibits judicial review of Jurisdictional Determinations. Indeed, the statute says nothing at all about judicial review of Jurisdictional Determinations. "[S]ilence of Congress as to judicial review is not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in federal courts." *Stark*, 321 U.S. at 309; *see also Dunlop v. Bachowski*, 421 U.S. 560, 566-67 (1975); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970).

Here, the statutory silence is striking because Congress expressly foreclosed judicial review of similar pre-enforcement non-permit decisions. If Congress had intended to preclude review of Jurisdictional Determinations, it knew how do to it. For example, in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, Congress expressly foreclosed courts from reviewing orders issued pursuant to Section 9606(a) except in specifically enumerated proceedings. *See* 42 U.S.C. § 9613(h). Congress did not include any similar limitation in the Clean Water Act.

Because the plain words of the Clean Water Act lack an express prohibition against judicial review, the Army Corps "bears the heavy burden of overcoming

the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision." *Dunlop*, 421 U.S. at 567 The presumption of reviewability demands that "[t]he question is phrased in terms of 'prohibition' rather than 'authorization[.]'" *Id.* (quoting *Abbott Labs*, 387 U.S. at 140). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* (quoting *Abbott Labs*, 387 U.S. at 141).

Turning to the remaining factors the Court considers, the Army Corps has offered no evidence that the legislative history of the Clean Water Act supports preclusion. *See Bowen*, 476 U.S. at 673 (noting that the court will consider "specific legislative history that is a reliable indicator of congressional intent"). That is because the Clean Water Act's legislative history contains no specific statement that would support preclusion of judicial review of Jurisdictional Determinations under the APA.

Finally, judicial review of Jurisdictional Determinations is consistent with the objective of the Clean Water Act. The Clean Water Act's "stated objective was 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1251). Judicial review of the Army Corps' assertion of jurisdiction based on a factually intensive analysis does not in any way defeat the purpose of the Clean Water Act. Rather, it is wholly consistent with

the statutory objectives because the Clean Water Act allows the Army Corps to exercise jurisdiction only over certain specified lands. The Army Corps should not be permitted to skirt judicial review of its exercise of extraterritorial jurisdiction over private property that does not fall within its reach.

2. Denying judicial review of Jurisdictional Determinations leaves landowners with no means of obtaining meaningful judicial review.

The leading consideration in determining whether the Clean Water Act precludes judicial review, is whether Respondents can otherwise obtain meaningful judicial review. *Thunder Basin*, 510 U.S. at 207 This consideration is based on the presumption that Congress does not intend to foreclose meaningful judicial review which would deny due process. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-51 (2010).

The Clean Water Act offers no "meaningful" review of Jurisdictional Determinations. Thus, without review under the APA, the only options available to Respondents, and the 10,000 property owners that receive Jurisdictional Determinations annually, are to abandon the project or to proceed and risk significant fines. The Army Corps argues that subsequent judicial review of any enforcement proceeding or permit

denial constitutes meaningful judicial review of its claim to jurisdiction. This Court has already found that it does not. Just four years ago in *Sackett*, this Court rejected a nearly identical argument made by the EPA. In doing so, the Court explained that enforcement proceedings did not constitute a means of obtaining meaningful review because each day that the landowner was denied an answer to its question, it accrued an additional $75,000 in potential liability, and potential criminal sanctions. *Sackett*, 132 S. Ct. at 1372.

Here, Respondents are faced with the same situation. They can either spend hundreds of thousands of dollars on pursuing a permit that they may or may not need (because the Army Corps may have erred in its unilateral determination that it has jurisdiction over the property), and that will likely be denied, or they can proceed with the peat harvesting project and risk substantial fines and criminal sanction. "When the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given." *Ex Parte Young*, 209 U.S. 123, 147 (1908). *See Free Enter. Fund*, 130 S. Ct. at 3143 (rejecting the government's argument that meaningful judicial review was available to petitioners because they could obtain adequate review by violating the law). Absent clear and convincing evidence of Congressional intent, the Court has never required a party to risk such immense liability to obtain judicial review and it should not do so now.

II. Denying judicial review of Jurisdictional Determinations violates separation of powers principles.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund*, 130 S. Ct. at 3156). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id.* at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined [and] will be exercised principally on external objects, as ware, peace, negotiation, and foreign commerce." The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961).

Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Members of the Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594 (Frankfurter, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution." *Id.* at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (James Madison) (Clinton Rossiter ed., 1961) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at

stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). *See id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

There are few administrative agencies whose actions exhibit the tyranny that our Founding Fathers feared more than the Army Corps and the EPA. Congress could have never predicted the vast expansion of jurisdiction that EPA and the Army Corps has pursued since the Clean Water Act was enacted in 1972. The Clean Water Act provides that it covers "the waters of the United States," 33 U.S.C. § 1362(7), but Congress did not define what it meant by "the waters of the United States." Since 1972, "the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). Time and again, this Court has rejected the Army Corps and EPA's expansive interpretation of its jurisdiction. *See Rapanos v. United States*, 547 U.S. 715, 732-39 (2006) (plurality opinion); *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 167-74 (2001).

The executive branch's latest attempt to expand its jurisdiction underscores the need for judicial review of Jurisdictional Determinations. In June 2015, the Army Corps and EPA published its final rule which expands the definition of "the waters of

the United States" to nearly every inch of the United States and for sure any piece of land that is wet at least part of the year. Clean Water Rule: Definition of "Waters of the United States," 80 Fed Reg. 37,053-37,127 (Jun. 29, 2015). Through legislation that would overturn the new expansive definition of "the waters of the United States," Congress recently attempted to reinstate the responsibilities and rights of property owners and the States that Congress intended to leave untouched by the Clean Water Act but that the Army Corps and EPA has tried to eviscerate. S.J. Res. 22, 114th Cong. (2015-2016). Despite the resolution passing, the President later vetoed it. Dozens of parties, including SLF, have also challenged the rule in district and circuit courts around the country.

The current administration and the present leadership of the Army Corps and the EPA believe that the need to restore and maintain the Nation's waters justifies the unilateral and unreviewable expansion of their jurisdiction. The Army Corps' insistence that the judiciary lacks any power to review Jurisdictional Determinations shows as much. Here, preclusion not only conflicts with the presumption of reviewability founded in common law and codified in the APA, but it runs afoul of the Constitution. As this Court has explained, "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse" than a judiciary that reviewed agency

action. *Free Enter. Fund*, 130 S. Ct. at 3157 (internal quotation marks, alterations, and citations omitted).

"The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 132 S. Ct. at 1374 (majority opinion). The lack of Congressional intent to preclude judicial review and lack of meaningful judicial review combined with the clear violation of separation of powers principles that preclusion would cause, supports affirmance of the Eighth Circuit's ruling and judicial review of Jurisdictional Determinations.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, OHIO, AND 21 OTHER STATES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is a jurisdictional determination that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In enacting the Clean Water Act ("CWA"), Congress specifically recognized the States' "traditional and primary power over land and water use" in our constitutional system. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Though Congress granted to the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps") certain authority over "navigable waters"—defined as "waters of the United States"—it expressly "recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights of States to plan the development and use of land and water resources." 33 U.S.C. § 1251(b); see also *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion); *SWANCC*, 531 U.S. at 174.

This case is significant to *amici curiae*—the States of West Virginia, Ohio, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming—because its outcome is critical to enforcing the limits on federal authority established in the CWA and decisions of this Court. At issue is whether property owners—including States and state agencies—can immediately seek judicial review of a "jurisdictional determination" by the Corps that a property is subject to federal jurisdiction as containing "waters of the United States." Such a jurisdictional determination may unlawfully assert

federal power over territory properly subject only to state regulation. Absent immediate judicial review, however, the pressure on landowners to comply means that most such jurisdictional determinations will go unchallenged, resulting in de facto expansions in federal authority.

As set forth below, immediate judicial review of the Corps' assertions of federal jurisdiction is justified for at least two reasons. *First*, under this Court's precedents, such jurisdictional determinations constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *Second*, immediate review of such jurisdictional determinations is required by this Court's longstanding rule that it will not upset the balance of federal-state relations without a clear statement from Congress.

SUMMARY OF ARGUMENT

I. Under this Court's decisions in *Bennett v. Spear*, 520 U.S. 154 (1997), and *Sackett v. EPA*, 132 S. Ct. 1367 (2012), a jurisdictional determination asserting federal authority is a "final agency action for which there is no other adequate remedy" and thus eligible for immediate review under 5 U.S.C. § 704 of the Administrative Procedure Act ("APA").

A jurisdictional determination asserting federal authority is "final agency action" under *Bennett* because it represents the consummation of the Corps' decision-making on the issue of jurisdiction, and because it has an immediate and practical impact on landowners, which include States and state agencies.

The Corps' own regulations describe such a jurisdictional determination as "final agency action." 33 C.F.R. § 320.1(a)(6). And once such a jurisdictional determination issues, property owners must refrain from conducting otherwise lawful activities on their land, endure the considerable time and expense of applying for a permit, or continue to use the land and face significant potential civil and criminal penalties.

There is also no adequate alternative remedy to immediate judicial review. Without immediate judicial review, the Corps can effectively compel regulated parties to comply without a court ever assessing the lawfulness of the agency's actions. The vast majority of property owners will comply even if they believe the Corps does not have authority over their property, because the alternatives—challenging the jurisdictional determination through the permitting process or awaiting enforcement—do not provide meaningful relief. Thus, as this Court observed in *Sackett*, preclusion of immediate review will only allow the "strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." 132 S. Ct. at 1374.

II. Review of such jurisdictional determinations under 5 U.S.C. § 704 is also required by principles of federalism. Land and water resource management is a quintessential function of state governments. 33 U.S.C. § 1251(b); *SWANCC*, 531 U.S. at 174. A jurisdictional determination asserting federal authority affects that sovereign function by restricting a State's policy choices over a particular water, including but not limited to the State's

discretion to determine the penalties that should be imposed upon those who violate applicable regulations. The Corps' approach raises federalism concerns because, as explained above, the lack of immediate judicial review means that the legality of many jurisdictional determinations is unlikely to be determined.

These concerns about the balance of federal-state authority provide further reason to read 5 U.S.C. § 704 to permit immediate review. It is a "well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotations omitted). This Court has applied that principle to protect the States' authority over land and water use from expansive interpretations of the federal government's jurisdiction, see *Rapanos*, 547 U.S. 715 (2006); *SWANCC*, 531 U.S. 159, and it should do so again here. Congress has not clearly indicated any intent to upset the balance of federal-state powers by allowing the Corps to defer judicial review of its assertions of federal authority.

ARGUMENT

I. Jurisdictional Determinations Asserting Federal Authority Are Final Agency Action For Which There Would Be No Other Adequate Remedy In Court.

The APA provides for judicial review of "final agency action for which there is no other adequate

remedy in a court." 5 U.S.C. § 704. Under this Court's decision in *Bennett v. Spear*, agency action is final when it (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177–78 (1997) (internal quotations omitted). Critically, Congress intended this review to be "widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977). The APA thus provides a "presumption of judicial review" that controls even where "efficiency of regulation" would benefit from denying review. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

Jurisdictional determinations asserting federal authority readily meet the requirements of 5 U.S.C. § 704. They satisfy both prongs of the *Bennett* test, and there is also "no other adequate remedy in a court." 5 U.S.C. § 704. Indeed, absent immediate review, property owners will be forced into compliance, and the vast majority of such jurisdictional determinations will escape judicial scrutiny.

A. Jurisdictional Determinations Asserting Federal Authority Meet Both Prongs of the *Bennett* Test.

Under the Corps' own regulations and agency guidance, jurisdictional determinations satisfy the first prong of *Bennett* in three ways. *First*, the Corps' regulations expressly state that an approved jurisdictional determination "shall constitute a Corps

final agency action." 33 C.F.R. § 320.1(a)(6). *Second*, the Corps' guidance document on jurisdictional determinations describes them as a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter, No. 08-02, at 5 (June 26, 2008). *Third*, the regulations also specifically contemplate court challenges to jurisdictional determinations as final agency action. In particular, the regulations provide an administrative appeals process specifically for jurisdictional determinations, which "[a]n affected party must exhaust prior to filing a lawsuit in the Federal courts." 33 C.F.R. § 320.1(a)(2).

It is beyond dispute that the first prong of *Bennett* is fulfilled. Thus, every court to consider this issue has found that jurisdictional determinations represent the Corps' final decision on the question of jurisdiction. See *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015) (citing *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389–90 (5th Cir. 2014) and *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591–93 (9th Cir. 2008)). In fact, the Corps appears to concede the point. "An approved jurisdictional determination for which administrative appeals have been completed may represent the consummation of the Corps' decisionmaking with respect to the presence of waters of the United States on particular property. The determination represents the agency's official view, *and it will remain in effect for five years unless*

conditions change or new information comes to light." Pet. Br. at 25 (emphasis added).

The second prong of *Bennett* is satisfied when an agency action determines "rights or obligations," 520 U.S. at 178 (internal quotations omitted), as a practical matter. In *Frozen Food Express v. United States*, 351 U.S. 40, 43–44 (1956), this Court found reviewable an Interstate Commerce Commission order that defined certain agricultural products as non-exempt and thereby required permits for carriers transporting those commodities. The order warned unauthorized carriers that if they transported these commodities, they risked civil and criminal penalties. *Id.* at 44. As a prohibition on carrying certain products without a permit, the order had "an immediate and practical impact" upon carriers, and was not "abstract, theoretical, or academic." *Id.* at 43–44. Because the "consequences" were "not conjectural," this Court directed the district court to "adjudicate the merits." *Id.* at 44–45.

A jurisdictional determination asserting the Corps' authority similarly has "immediate and practical" consequences. *Id.* at 44. Again, the Corps acknowledges that "the determination is the consummation of the Corps' decisionmaking process with respect to CWA coverage of the relevant site." Pet. Br. at 33–34. As such, where the Corps asserts jurisdiction, that determination immediately limits the landowner's rights in his or her land whether or not the property owner decides to apply for a permit.

Property owners subject to such jurisdictional determinations who do not apply for a permit must

restrict the use of their property or face significant penalties for failure to comply. If the landowner proceeds to construct a house, build a fence, or farm the land without applying for a permit, he or she risks criminal liability resulting in fines up to $25,000 per day and imprisonment for up to one year for negligent violations. 33 U.S.C. § 1319(c). In the case of knowing violations, the landowner faces fines up to $50,000 per day and imprisonment for up to 3 years. *Ibid.*

At the same time, a property owner who does apply for a permit also faces restrictions on his or her rights as a result of the jurisdictional determination. In applying for a permit, the landowner faces spending up to two years and over $200,000 on the permit application process. See *Rapanos*, 547 U.S. at 721 (plurality opinion). As this Court has observed, "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Ibid.* And even if the applicant is fortunate enough that his or her proposed discharge is eligible for a nationwide rather than individual permit, the process is quicker and cheaper but still takes on average "313 days and $38,915." *Ibid.*

In both scenarios—where the landowner applies for a permit and where the landowner proceeds without one—the Corps' assertion of federal jurisdiction has an "immediate and practical" effect on the owner's rights and obligations. *Frozen Food Express*, 351 U.S. at 44. The property owner must refrain from conducting otherwise lawful activities on his or her land, endure the expense of applying for a permit, or continue to use his or her land and face

significant potential civil and criminal penalties. These effects are not "conjectural," or "abstract, theoretical, or academic." *Id.* at 44.

Importantly, these landowners are not simply private citizens, but also States and state agencies. Jurisdictional determinations asserting the Corps' authority over land owned by States and state agencies have equally immediate and practical consequences on efforts to build on, improve, or otherwise use state land. In the case of States, the federal permitting requirements that result from the Corps' assertion of federal jurisdiction mean delay in important state projects and the added expense of applying for permits. *Cf. SWANCC*, 531 U.S. at 162–63 (involving "consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste").

Finally, the Corps' concession that it is bound by its jurisdictional determinations finding *no* federal jurisdiction further highlights that the second *Bennett* prong is met here. The Corps admits that absent a change in conditions or new information, a finding of no jurisdiction "will remain in effect for five years," during which time the Corps cannot change its position on jurisdiction or commence enforcement proceedings. See Pet. Br. at 25, 40–41. In other words, clear legal consequences follow even where the Corps determines that it *lacks* authority to act. It follows that where the Corps does find that federal jurisdiction exists, legal consequences must flow from that decision, as well.

B. Absent Immediate Review Under 5 U.S.C. § 704, There Is No Other Adequate Remedy In Court.

In addition to being "final" under *Bennett*, a jurisdictional determination asserting federal authority also satisfies the requirement under 5 U.S.C. § 704 that there be "no other adequate remedy in a court."

This Court has taken a practical view of such questions. For example, this Court concluded in *Frozen Food* that a restriction on otherwise lawful behavior required immediate judicial review even though the regulation allowed the carrier to apply for a permit, 351 U.S. at 44, the denial of which could presumably be challenged in court. The restriction on otherwise lawful behavior absent a permit was sufficient for review. *Ibid.* And recently in *Sackett v. EPA*, this Court rejected the notion that the ability to challenge a jurisdictional finding by way of a defense in a civil enforcement action provided the landowner with an adequate remedy. 132 S. Ct. at 1372. The Court reasoned that the landowner cannot, as a practical matter, initiate the enforcement process and accrues significant potential liability each day until the proceeding is initiated. *Ibid.*

Under this practical approach, there is no merit to the Corps' argument that property owners have an adequate remedy because they can undertake the lengthy and costly permit process and challenge a jurisdictional determination if the Corps denies their permit applications. Regardless of whether the Corps

grants or denies a permit, the permit process provides no adequate alternative to immediate judicial review.

If the permit is granted, the landowner has not only spent money and time applying for the permit but must also comply with the conditions imposed by the permit. See 33 C.F.R. § 325.4. All of these costs are imposed without allowing the landowner ever being able to challenge the jurisdictional determination and assert that the permit was not legally required in the first place.

If the permit is denied, the landowner has the ability then to challenge the jurisdictional determination, but the relief is still inadequate as compared to immediate judicial review. A landowner in that situation will have spent a significant amount of unrecoverable time and money applying for a permit that would not have been required if a court had immediately judged the jurisdictional determination unlawful.

Similarly erroneous is the Corps' suggestion that an enforcement proceeding provides property owners an adequate alternative to challenge the validity of a jurisdictional determination. As noted above, this Court rejected nearly the same argument by EPA in *Sackett* because the landowner could not initiate the enforcement process and was subject to additional potential liability for each day while waiting for the enforcement process to begin. 132 S. Ct. at 1372. Here, a landowner likewise cannot initiate an enforcement process to challenge a jurisdictional determination. In the meantime, he or she faces fines

up to $50,000 per day and imprisonment for up to three years. 33 U.S.C. § 1319(c). No landowner should have to risk those fines and imprisonment before being able to challenge the Corps' threshold jurisdictional conclusions. *Cf. Ex parte Young*, 209 U.S. 123, 147 (1908) ("[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.").

The reality is that without immediate judicial review, the Corps can effectively compel regulated parties—including sovereign States and their agencies—to comply with a jurisdictional determination without a court ever assessing the lawfulness of the agency's actions. The vast majority of property owners will comply even if they believe the Corps does not have authority over their property because the alternatives—challenging the jurisdictional determination through the permitting process or awaiting enforcement—do not provide timely or meaningful relief. As this Court observed in *Sackett*, preclusion of immediate review allows the "strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." 132 S. Ct. at 1374. This Court should send a strong message that the Corps and other federal agencies may not extract compliance simply by limiting or delaying judicial review.

II. The Statute Should Be Read To Avoid The Serious Federalism Concerns That Would Result From Precluding Immediate Judicial Review.

If adopted, the Corps' position would raise serious federalism concerns in light of the States' traditional role in land and water use management. The CWA preserved the States' traditional role in managing the use of water resources. And this Court has protected that state power from expansions of federal authority that threaten it. See *Rapanos v. United States*, 547 U.S. 715 (2006); *SWANCC*, 531 U.S. 159. But as explained above, absent immediate judicial review, the Corps' assertions of federal jurisdiction are likely to go unchallenged, resulting in de facto expansions of federal authority.

Those federalism concerns further require reading the APA to permit immediate review of such jurisdictional determinations. This Court has long recognized that courts should avoid reading federal law to alter the traditional balance of federal and state powers absent a clear statement from Congress. See *Bond v. United States*, 134 S. Ct. at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). That principle has been applied previously to protect the States' authority over land and water use from expansive interpretations of the federal government's jurisdiction, see *Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159, and should be applied here, as well. Congress has not clearly indicated any intent to upset the balance of federal-state powers by allowing the Corps to defer judicial review of its assertions of federal authority.

A. Preclusion Of Immediate Judicial Review Interferes With The States' Authority Over Land And Water Use.

1. It is well understood that local responsibility for protecting land and water use provides numerous benefits. Federalism "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive to putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. at 458). These advantages of local control are particularly important in the area of land and water use management, as States with very different water resources benefit from having different policies to ensure effective management of the use of these resources.

Thus, Congress specifically preserved the States' regulatory regimes in the CWA. In granting to EPA and the Corps certain regulatory authority under the CWA, Congress expressly "recogniz[ed], preserv[ed], and protect[ed] the primary responsibilities and rights of States to plan the development and use of land and water resources." 33 U.S.C. § 1251(b). As this Court has explained, Congress did not in the CWA "readjust the federal-state balance." *SWANCC*, 531 U.S. at 174.

Among those regulatory regimes are state permitting regimes and express duties codified in state law to protect the waters of a State for the

future use and enjoyment of the State's citizens. For example, West Virginia law requires a person to obtain a state permit from the West Virginia Department of Environmental Protection before discharging into waters of the State. W. Va. Code § 22-11-8. Similarly, Utah has a permit program to regulate discharges into waters of the State. Utah Code Ann. §§ 19-5-107–108. See also W. Va. Code § 22-26-3 ("[t]he waters of the State of West Virginia are claimed as valuable public natural resources held by the state for the use and benefit of its citizens" and the State has a duty to "manage and protect its waters effectively for present and future use and enjoyment and for the protection of the environment"); Ala. Code § 22-22-2 (the State shall "provide for the prevention, abatement and control of new or existing water pollution"); Ky. Rev. Stat. Ann § 151.110(1)(a) (the State has a statutory duty to "promote and to regulate the conservation, development, and most beneficial use of the water resources"); Utah Code Ann. § 73-1-1(3) (the "Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property").

Consistent with the CWA's express instruction and principles of federalism, this Court has repeatedly protected the role of the States in land and water use management. It has twice struck down attempts by federal agencies to stretch the phrase "'waters of the United States' beyond parody," *Rapanos*, 547 U.S. at 734 (plurality opinion), at the expense of the States' authority. See *id.*, 547 U.S. 715; *SWANCC*, 531 U.S. 159. In each instance, this Court found that the agencies had failed to comply

with the CWA and interfered with the States' constitutionally protected role as the traditional regulators of water resources.

In *SWANCC*, this Court rejected as overbroad the Corps' Migratory Bird Rule. 531 U.S. at 174. A group of municipalities challenged the Corps' exercise of jurisdiction over an abandoned sand and gravel pit on which the municipalities planned to develop a solid waste disposal site. *Id.* at 162-63. The Corps claimed that the sand and gravel pit was within its authority under the Migratory Bird Rule, which defined "waters of the United States" in part as waters "[w]hich are or would be used as habitat by migratory birds." *Id.* at 164. This Court rejected the Rule because it "would result in a significant impingement on the States' traditional and primary power over land and water use." *Id.* at 174 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")).

In *Rapanos*, a plurality of this Court rejected an attempt by the Corps and EPA to assert federal jurisdiction over wetlands near non-navigable tributaries of traditional navigable waters. 547 U.S. 715. Again, this Court recognized that the federal government's expansive interpretation of the CWA would interfere with "the States' traditional and primary power over land and water use." *Id.* at 738 (plurality opinion) (quoting *SWANCC*, 531 U.S. at 174). The "[r]egulation of land use, as through the issuance of development permits," this Court said, "is a quintessential state and local power." *Ibid.* (citing *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30

(1982); *Hess*, 513 U.S. at 44). The federal government's asserted jurisdiction would have "authorize[d] the Corps to function as a *de facto* regulator of immense stretches of intrastate land," displacing the States' role. *Ibid.*

2. When the federal government asserts authority over a parcel by concluding it contains "waters of the United States," it potentially claims jurisdiction at the expense of the States' sovereign authority. Section 404 of the CWA displaces the States' authority by setting a federal floor on discharges of dredged or fill material into the water. While States retain the ability to regulate beyond the federal minimum and to issue state certifications under Section 401 of the CWA, States nevertheless are deprived of a critical aspect of their sovereignty—the ability to make policy decisions in a core area of state concern. See *Mississippi*, 456 U.S. at 761 ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). States lose the authority to impose regulations that are entirely different than the CWA would apply. This includes not only the State's discretion to determine when and to what extent the waters and lands would be protected, but also its freedom to design the procedures that would be followed to protect those waters and lands, and to determine the penalties that would be imposed upon those who violate those protections. And when States are the owners of the parcel over which the Corps has asserted jurisdiction, the States themselves are additionally subject to the federal permitting requirements.

Timely judicial review is critical to enforcing the limits on federal authority established in the CWA and decisions of this Court. Without immediate judicial review, unlawful claims of jurisdiction by the Corps are likely to go unchallenged by individual property owners. As described above, see pp. 10–12, *supra*, there is no adequate alternative remedy in court; absent an opportunity to seek immediate review, the vast majority of property owners will comply with a Corps jurisdictional determination even if they believe the Corps does not have authority over their property.

As this Court has recognized, whether brought by States in their capacity as landowners or by other property owners, these kinds of lawsuits are an important bulwark against federal encroachment. "Fidelity to principles of federalism is not for the States alone to vindicate." *Bond*, 131 S. Ct. at 2364. "States are not the sole intended beneficiaries of federalism"; rather, "[f]ederalism secures the freedom of the individual." *Id.* at 2364. Indeed, this Court's two principal cases preserving the States' role in land and water use, *SWANCC* and *Rapanos*, both resulted from challenges made by non-State regulated entities—in the former, a group of regulated municipalities, and in the latter, a homeowner. *Cf. Bond*, 134 S. Ct. at 2365 ("In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.").

The importance of these lawsuits is amplified by the current litigation over the Waters of the United

States Rule ("WOTUS Rule"), through which EPA and the Corps have sought to expand radically the definition of "Waters of the United States" under the CWA. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). Thirty-two States and state agencies have challenged the WOTUS Rule, alleging that it violates the CWA, this Court's decisions in *Rapanos* and *SWANCC*, and the Constitution. That litigation is significant not only because it demonstrates the Corps' intent to claim increased federal jurisdiction under the CWA, but also because the Corps has taken the position in that case that the window to challenge the WOTUS Rule has already closed. See Gov't Opp. to Mot. to Dismiss at 19-20, *In re EPA*, No. 15-3751 (6th Cir. Oct. 23, 2015) (arguing for 120-day window for review under 33 U.S.C. § 1369(b) as opposed to six years under the APA). The WOTUS Rule litigation is yet another example of an effort by the Corps, as here, to limit judicial review. And its attempt specifically to insulate the expansive WOTUS Rule from review highlights the need to ensure that, at a minimum, challenges to individual jurisdictional determinations remain an effective case-by-case check on federal overreach under the CWA.

B. There is no clear and manifest statement expressing Congress's intent to upset the federal-state balance by deferring judicial review.

These federalism concerns trigger an important clear-statement rule. As this Court has explained, "Congress legislates against the backdrop" of certain

presumptions, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), including several that stem from the "relationship between the Federal Government and the States under our Constitution," *Bond*, 134 S. Ct. at 2088. For example, this Court has recognized the presumption that federal statutes do not abrogate sovereign immunity, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); impose obligations on States through section 5 of the Fourteenth Amendment, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16–17 (1981); or preempt state law, *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947).

Relevant here is the principle that it is "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089 (quoting *Gregory*, 501 U.S. at 460). This Court has recognized and applied this principle in "several areas of traditional state responsibility," *ibid.*, including the qualifications of state judges, *Gregory*, 501 U.S. at 460; real estate titles, *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994); local criminal activity, *Bond*, 134 S. Ct. 2077; and land and water use, *SWANCC*, 531 U.S. at 174.

For example, this Court rejected in *Bond* a reading of the term "chemical weapon" in the Chemical Weapons Convention Implementation Act that would "reach purely local crimes," 134 S. Ct. at 2090. The case presented the question whether a person who used a chemical to cause a minor thumb burn could be prosecuted under the federal Chemical

Weapons Convention Implementation Act, *id.* at 2083, which broadly defined "chemical weapon" as any toxic chemical used for other than peaceful purposes, *id.* at 2084–85. While the plain text of the Act might have included the conduct, the Court rejected such a reading of the statute because it was inconsistent with the backdrop of "principles of federalism inherent in our constitutional structure." *Id.* at 2088. Noting that the federal government's reading would "'dramatically intrude upon traditional state criminal jurisdiction,'" *ibid.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)), this Court declined to adopt that reading absent "a clear indication that Congress meant to reach purely local crimes" and "intrude[] on the police power of the States," *id.* at 2090.

This Court has also applied this principle to the precise area of traditional state regulation at issue here—land and water use management. In *SWANCC*, this Court struck down the Corps' Migratory Bird Rule because it found "nothing approaching a clear statement from Congress that it intended to readjust the federal-state balance." 531 U.S. at 174; see also *id.* at 172–73 (requiring a "clear indication [from] Congress" because "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"). Similarly, the plurality in *Rapanos* rejected for lack of a clear statement an attempt by the federal government to transform the Corps into "a *de facto* regulator of immense stretches of intrastate land" with "discretion that would befit a local zoning board." 547 U.S. at 738 (plurality opinion). The plurality rejected such an

"unprecedented intrusion into traditional state authority" in the absence of a "'clear and manifest' statement from Congress." *Ibid.* (quoting *BFP*, 511 U.S. at 544).

In this case, there is no clear statement from Congress indicating an intent to upset the balance of federal-state powers by allowing the Corps to defer judicial review of its jurisdictional determinations. Nothing in 5 U.S.C. § 704 or the CWA even "approach[es] a clear statement from Congress that it intended" to allow the Corps' assertions of federal jurisdiction to effectively go unchallenged and result in a de facto expansion of federal authority at the expense of the States. If anything, the CWA contains a clear statement to the contrary. *SWANCC*, 531 U.S. at 174 ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.'" (citing 33 U.S.C. § 1251(b))).

Federalism principles thus bolster the conclusion that the Corps' jurisdictional determinations asserting federal authority are final agency actions reviewable under 5 U.S.C. § 704. For this additional reason, this Court should reject the Corps' attempt to insulate its decisions from review.

CONCLUSION

The decision below should be affirmed.

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